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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 75

INTERNATIONAL HARVESTER COMPANY,
APPELLANT,

vs.

TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 29, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 75

INTERNATIONAL HARVESTER COMPANY, APPELLANT,

vs.

TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] **SUPREME COURT OF THE UNITED STATES**

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INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, Appellee.

On Appeal From the Supreme Court of the State of Ohio

PETITION FOR APPEAL—Filed February 19, 1946

Being agreed by the final decision of the Supreme Court of the State of Ohio in the above entitled cause, the Appellant therein and herein, International Harvester Company, hereby prays that an appeal therefrom be allowed to the Supreme Court of the United States of America.

In support of this Petition for Appeal, Appellant assigns the following errors in the record and proceedings in said cause:

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore is a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 2] 2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the

trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

For which errors Appellant prays that said judgment and decision of the Supreme Court of the State of Ohio, entered November 21, 1945, in the above entitled cause, be reversed and a judgment rendered in favor of said Appellant and for costs.

Dated February 19th, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Counsel for Appellant.

[fol. 3] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 19, 1946

In support of its Petition for Appeal in the above entitled cause to the Supreme Court of the United States, the appellant therein and herein, International Harvester Company, hereby assigns the following errors in the record and proceedings in said cause.

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said

sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved [fol. 4] in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

Dated February 19, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Counsel for Appellant.

[fol. 5] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 19, 1946

The Appellant in the above entitled cause having this day filed its petition herein praying for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of the State of Ohio on the 21st day of November, 1945, and from each and every part of said judgment adverse to said Appellant, and having presented its Petition for Appeal and Prayer for Reversal, Assignment of Errors, and Statement as to Jurisdiction pursuant to the statutes and to the rules of the Supreme Court of the United States in such case made and provided;

It is therefore now ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause in accordance with the rules of the Supreme Court of the United States and transmit the same to the Supreme Court of the United States, so that said transcript shall be filed with said Court within forty (40) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars ($1,000.00) bond for which, with Fidelity and Deposit [fols. 6-63] Company of Maryland, as surety thereon, is now presented by Appellant, is approved, and ordered filed with the Clerk of this Court.

Entered at Columbus, Ohio, this 19th day of February, 1946.

Carl V. Weygandt, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 64] IN THE SUPREME COURT OF OHIO

No. 30316

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, Appellee

AMENDED NOTICE OF APPEAL

International Harvester Company, Appellant in the foregoing cause, hereby appeals from the decision of the Board of Tax Appeals, Department of Taxation of Ohio, rendered on February 14, 1945, in its cause No. 7994.

In its decision the said Board of Tax Appeals modified the action of the Tax Commissioner in making the assessments complained of and, as modified, affirmed them.

The assessments complained of were assessments of Ohio Franchise Taxes against Appellant, International Harvester Company, for the years 1935 to 1940 inclusive, the amount for each year being set out below.

Year	Fee
1935	$ 26,978.70
1936	31,416.71
1937	27,112.04
1938	23,787.15
1939	25,390.28
1940	29,882.66
	$ 164,567.54

In its decision the said Board of Tax Appeals modified the determination of the Tax Commissioner by excluding [fol. 65] from the amount of Ohio business of the Appellant, International Harvester Company, all sales of motor trucks produced at its factory at Springfield, Ohio, where the trucks were shipped from the factory to the branches of International Harvester Company all over the United States, and later sold by those branches to dealers and consumers.

The decision of said Board of Tax Appeals stated:

> "From a full consideration of the evidence and the stipulations, the Board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified."

The Ohio Board of Tax Appeals affirmed the action of the Tax Commissioner in including in Ohio business of the Appellant all sales of motor trucks produced at the Appellant's plant at Springfield, Ohio, where the orders or contracts were solicited by salesmen of the branches of the Company outside of Ohio, the orders or contracts were accepted by the branches outside of Ohio, and the trucks were shipped on the direction of said branches by the factory at Springfield, Ohio, direct to the buyer, either dealer or consumer, in states outside of Ohio.

The Appellant herein contended in its Appeal to said Board of Tax Appeals that the taxes as assessed by the Tax Commissioner denied the Appellant due process of law

under the Fourteenth Amendment to the United States Constitution, and were a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

[fol. 66] Said Board of Tax Appeals in its decision held that the tax assessments in question violated neither the Due Process Clause nor the Commerce Clause of the United States Constitution.

Errors Complained Of

Appellant complains of the following errors in said decision of the Ohio Board of Tax Appeals:

(1) The Board erred by sustaining the Tax Commissioner in including in the basis of his assessments, sales of motor trucks in the years in question where the orders or contracts were solicited and accepted by branches of International Harvester Company outside of the State of Ohio, and where the trucks were shipped from the Springfield Works of International Harvester Company at Springfield, Ohio, on the direction of said branches direct to the buyers in other states, for the reason that said sales are not Ohio business under the terms of the Ohio Franchise Tax Act.

(2) The Board erred in including in business done in Ohio sales of motor trucks produced at the Springfield Works of International Harvester Company at Springfield, Ohio, where the orders or contracts were solicited and accepted by branches of the Appellant outside Ohio and the trucks were shipped by the factory at Springfield, Ohio, direct to buyers in other states on direction of said branches, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore is invalid under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(3) The Board erred in including in business done in Ohio sales of motor trucks produced at the Springfield [fol. 67] Works of International Harvester Company at Springfield, Ohio, where the orders or contracts were solicited and accepted by branches of the Appellant outside Ohio and the trucks were shipped by the factory at Springfield, Ohio, direct to buyers in other states on direction of

said branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

(4) Said Board of Tax Appeals erred by assessing the tax for the 10 months' fiscal year ended October 31, 1936, namely the period from January 1 to October 31, 1936, on a full year's basis, whereas said period was only a 10 months' period and the tax should have been reduced to five-sixths of the annual tax.

(5) The said Board of Tax Appeals erred in its decision by making no deduction for the amount of goods sold by branches of the Company in Ohio when the goods were shipped direct from factories or transfer houses of the Company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts solicited and accepted by branches of the Company outside of Ohio, when the goods were shipped from the factory at Springfield, Ohio, direct to buyers in other states.

For which errors Appellant prays that said Entry of the Board of Tax Appeals, Department of Taxation of Ohio, entered February 14, 1945 in the above entitled cause, be reversed and judgment rendered in favor of Appellant for the reasons hereinabove set out.

A copy of the Entry of the Board of Tax Appeals, De-
[fols. 68-70] partment of Taxation of Ohio, in the above entitled cause, No. 7994 on the docket of said Board of Tax Appeals, is attached hereto and made a part hereof.

O. H. Mosier and Edward R. Lewis, Attorneys for Appellant.

March 19, 1945.

(The "Entry", dated Feb. 14, 1945, of the Board of Tax Appeals, Department of Taxation of Ohio, in which is contained the judgment and opinion of said Board of Tax Appeals, in the cause below, International Harvester Company, Appellant vs. William S. Evatt, Tax Commissioner, No. 7994, is set out in the printed Record of the Supreme Court of Ohio, pages 121 to 144.)

[fol. 71] BEFORE THE DEPARTMENT OF TAXATION OF OHIO

In the Matter of the Application of the International Harvester Company, Chicago, Illinois, for Review and Correction of Franchise Tax Certified to the Treasurer of State, July 29, 1941, Against Such Company for the Years 1935 to 1940, Both Inclusive.

FOREIGN ARREARAGES CORPORATIONS CERTIFIED TO ATTORNEY GENERAL JULY 25, 1941.

Dept. No.	Name of Company, Address	Year Del.	Amount on which charge based			Tax
1869	International Harvester Co., R. E. McDowell, 180 N. Michigan Ave., Chicago, Ill.	1935	26	978	699	$26,978.70
		1936	31	416	710	31,416.71
		1937	27	112	037	27,112.04
		1938	23	787	150	23,787.15
		1939	25	390	283	25,390.28
		1940	29	882	657	29,882.66
				Total		$164,567.54

[fol. 71-A] BEFORE DEPARTMENT OF TAXATION OF OHIO

APPLICATION FOR REVIEW—Filed August 29, 1941.

To the Honorable Department of Taxation of Ohio, Columbus, Ohio.

Re: Additional Assessments of Ohio Franchise Taxes Against International Harvester Company Under Section 5461, General Code, for the Years 1935, 1936, 1937, 1938, 1939 and 1940.

Gentlemen:

The International Harvester Company has received from Don H. Ebright, treasurer of the state of Ohio, 1940 foreign franchise fee notice, for additional Ohio foreign franchise taxes against the International Harvester Company for the years 1935 to 1940, inclusive, in the following amounts:

	Valuation	Fee
1935	$26,978,699.00	$26,978.70
1936	31,416,710.00	31,416.71
1937	27,112,037.00	27,112.04
1938	23,787,150.00	23,787.15
1939	25,390,283.00	25,390.28
1940	29,882,657.00	29,882.66
		$164,567.54

We have also received a letter, dated July 30, 1941, signed by Wm. M. Pearson, chief of the franchise division, enclosing a certified copy of the journal entry, dated July [fol. 72] 29, 1941, stating that the application of the International Harvester Company for review and correction of the franchise valuation certified against it for the years 1935 to 1940 has been considered and that the tax commissioner "finds that such assessments as made by the Department of Taxation are correct and in accordance with the franchise tax laws as interpreted by the attorney general of Ohio" and that the application for review and correction is, therefore, denied.

The International Harvester Company received original notice from the Department of Taxation of additional franchise taxes, dated March 25, 1941, proposing to assess taxes in the amount of $271,153.72 for the years 1935 to 1940 inclusive. Thereupon the International Harvester Company filed its protest under date of April 24, 1941, and a conference was held on May 21 at which the International Harvester Company was represented by C. L. Johns, its auditor of tax returns, and Edward R. Lewis, its attorney, and the Department of Taxation was represented by Mr. Wm. S. Evatt, tax commissioner, Wm. Pearson, chief of the franchise division, Fred M. Wildermuth, special examiner, franchise division, and J. W. Foley, examiner in the franchise tax division.

Thereafter, on July 9, 1941, the International Harvester Company submitted a statement of its argument on the legal questions involved, on the understanding that the matter would be referred to the attorney general of Ohio for his opinion. After receiving the above letter of July 30, 1941 from Mr. Wm. M. Pearson, enclosing a certified copy of the journal entry of the tax commissioner for re-

[fol. 72-A] view and correction, I called up Mr. Pearson on long distance telephone and was told that the matter is now in the hands of the attorney general, and that the International Harvester Company has no further steps to take until action is taken by the attorney general.

The notice of assessment from the treasurer of the state of Ohio is for $164,567.54. The amount has been reduced after presentation of various exhibits and schedules by the taxpayer from the amount proposed in the original letter of the Department of Taxation of March 25, 1941, wherein it was stated that it was proposed to assess additional franchise taxes amounting to $271,153.72.

The taxpayer accordingly makes herewith application for review and correction of said additional franchise taxes for the years 1935 to 1940, and in support of this application desires that its memorandum of July 8, 1941, submitted with its letter of July 9, 1941, to Mr. Wm. S. Evatt, tax commissioner, be considered as submitted in support of this application for review and correction, together with its statements of April 25, 1941 and April 24, 1941, addressed to the Honorable Department of Taxation of the state of Ohio.

Yours very truly, International Harvester Company, by Edward R. Lewis.

ERL*F

[fol. 73] BEFORE DEPARTMENT OF TAXATION OF OHIO

RIDER DENYING APPLICATION FOR REVIEW—Entered December 2, 1943.

The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943.

Department of Taxation, William S. Evatt, Tax Commissioner.

[Duly certified.]

[fol. 73-A] BEFORE BOARD OF TAX APPEALS,
DEPARTMENT OF TAXATION OF OHIO

INTERNATIONAL HARVESTER COMPANY, Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, Appellee.

NOTICE OF APPEAL.

International Harvester Company, a corporation of the state of New Jersey with general offices in Chicago, Illinois, appellant herein, hereby appeals from the determination by William S. Evatt, tax commissioner of the state of Ohio, dated December 3, 1943, which stated:

> "The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943."

A true copy of said notice sent by the commissioner is attached hereto.

Said application of the appellant herein for review and correction asked for review and correction of the [fol. 74] franchise tax valuations set forth in notice from the treasurer of state of Ohio, not dated, but stating that there would be 15% penalty if not paid on or before August 30, 1941, the valuations set forth and additional franchise tax fees claimed due therefor being as follows:

	Valuation	Fee
1935	$26,978,699.00	$26,978.70
1936	31,416,710.00	31,416.71
1937	27,112,037.00	27,112.04
1938	23,787,150.00	23,787.15
1939	25,390,283.00	25,390.28
1940	29,882,657.00	29,882.66
		$164,567.54

The appellant herein specifies errors in said franchise tax valuations and the additional fees based thereon, as follows:

(1) Said additional franchise tax valuations and franchise tax fees based thereon are erroneous in that said franchise tax valuations include in the numerator of the fraction of "business done", sales of appellant's products produced by its plant at Springfield, Ohio, which sales were made by branches of the appellant outside of Ohio.

Appellant contends that such sales are not business done in Ohio, and that the inclusion of such sales in the figure of Ohio business done results in allocating to Ohio an arbitrary and excessive proportion of the total net worth of the company, and accordingly that the assessments based on such a method would result in taxing property and busi-[fol. 74-A] ness of the International Harvester Company outside the state of Ohio, and deny due process of law under the Fourteenth Amendment of the Constitution of the United States.

(2) Rule No. 275 adopted by the tax commissioner of Ohio under date of October 13, 1939, provides as follows, to wit:

> "Rule No. 275. Business done in and out of Ohio. —Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made."

Appellant, however, submits that in the assessments involved in this appeal no deduction has been made for products of the appellant manufactured in Ohio, which were sold from warehouses outside of Ohio, and no deduction has been made for products manufactured outside Ohio and shipped by the outside factory direct to a

dealer in Ohio, and to that extent the assessments are in violation of said Rule No. 275.

[fol. 75] (3) Furthermore, since said Rule No. 275 was not adopted until October 13, 1939, it was adopted after the end of the fiscal years of the appellant on which the franchise taxes involved in this appeal were based, the franchise tax being in each year based on business done in the year prior thereto, except the fiscal year ending October 31, 1939, on which the franchise tax for 1940 was based, and in the case of the fiscal year ending October 31, 1939 said Rule No. 275 was adopted only 18 days before the end of such year.

Appellant contends, therefore, that said Rule No. 275 cannot lawfully be applied retroactively to the years prior to its adoption.

Moreover, appellant contends that it is inequitable to apply said rule retroactively. Said Rule No. 275 treats as business done in Ohio sales of goods by branches in other states which, under appellant's method of doing business, are never treated as business done in the state where the manufacturing operations are carried on. Appellant has no figures of sales in the years 1934 to 1938 inclusive of goods produced by its Springfield Works, Springfield, Ohio, which were completed by shipments from said Springfield Works direct to buyers in other states, and such figures cannot now be obtained. By considerable effort, appellant has obtained such figures for the year ending October 31, 1939 by examining more than 58,000 invoices of shipments of motor trucks from the Springfield Works to dealers in other states.

(4) Appellant further contends that the application of Rule No. 275 results in treating as business done in [fol. 75-A] Ohio, sales which are not made in Ohio but in other states, and that the assessments based on Rule No. 275 would result in taxing property and business of the International Harvester Company outside of the state of Ohio, and would therefore deny due process of law under the Fourteenth Amendment of the Constitution of the United States.

(5) Appellant further contends that under said Rule No. 275 Ohio includes as business done in Ohio, sales by branches outside the state of Ohio to purchases outside

the state of Ohio, and yet in many states, both for franchise taxes and for income taxes, the states require and the appellant pays franchise and income taxes, using as a measure for the proportion of the franchise tax value or the proportion of income allocated to the state the sales made by branches in that state to buyers in that state, or in many cases to buyers wherever situated, and that accordingly said Rule No. 275 will result in the same sales being used as the measure of taxes both in the state where the branch is located and in the state of Ohio in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

(6) Said Rule No. 275, set out above, states that in the case of manufacturing companies "all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In the assessments herein involved, there is included in the numerator of the fraction of business done in Ohio, the sales of products of the Springfield Works, Springfield, Ohio, which were effected by branches outside the [fol. 76] state of Ohio. In those sales the orders or contracts of sale were obtained by salesmen employed by branches outside the state of Ohio, or were received by mail by said branches, the proceeds of the sales either in notes or cash were received and collected by branches outside the state of Ohio, and the branches outside the state of Ohio supervised the transaction from beginning to end.

Appellant contends that all sales of Springfield Works' products made by branches of the International Harvester Company located outside the state of Ohio are "sold from warehouses outside of this state." Said Rule No. 275 does not require that the goods be delivered from a warehouse outside the state, but merely that they be sold from warehouses outside the state.

Appellant contends accordingly that where goods are shipped from the Springfield Works direct to buyers in other states on orders and contracts taken and accepted by branches in other states, where such out of state branches receive the proceeds and handle the sales from beginning to end and direct the Springfield Works to ship to the purchasers, that the sales are made from warehouses outside the state of Ohio.

(7) Pursuant to Section 1464-4 of the General Code of Ohio, appellant makes application herewith for a review of said Rule No. 275 on the ground that said rule is unreasonable and is unauthorized for the following reasons:

The Ohio Franchise Tax Law, General Code of Ohio, Section 5498, provides that the value of the outstanding stock of a foreign corporation shall be divided into two [fol. 76-A] parts and that one-half of such value shall be multiplied by a fraction whose numerator is the fair value of the corporation's property owned and used by it in Ohio, and whose denominator is the fair value of all its property wherever situated, eliminating good-will, and the other half of the capital stock value shall be multiplied by a fraction whose numerator is the "value of the business done by the corporation in this state" and whose denominator is "the total value of its business" during the year in question. Said Rule No. 275 provides that there shall be treated as business done in Ohio, all sales of goods manufactured in Ohio wherever situated, except sales of goods sold from warehouses outside of Ohio. No authority is granted the tax commissioner to define the words "business done" to include sales made outside the state of Ohio.

Said Rule No. 275, moreover, is inconsistent as it treats as business done in Ohio all sales of goods sold from warehouses in Ohio, although some of said goods were manufactured outside of Ohio; and on the other hand, treats as business done outside of Ohio all sales of goods sold from warehouses outside of Ohio, although some of said goods were manufactured in Ohio.

Said Rule No. 275 is, therefore, based neither on sales in Ohio nor on manufacturing activity in Ohio, but on a combination of sales and manufacturing activity.

Appellant further contends that the Ohio Franchise Tax is not levied on the manufacturing activity, but on the privilege of doing business in the state of all kinds, manufacturing, selling and other activities, and that Rule No. 275 in attempting to base one-half the tax on [fol. 77] manufacturing activity is in violation of the provisions of the Ohio Franchise Tax Law.

Respectfully submitted this twenty-fourth day of December, 1943.

International Harvester Company, by Edward R. Lewis, its Attorney.

NOTICE

In the Matter of the Application of the International Harvester Company, Chicago, Illinois, for Review and Correction of Franchise Tax Certified to the Treasurer of State July 29th, 1941, Against Such Company for the Years 1935 to 1940, Both Inclusive

(December 3, 1943.)

The application of the above company for review and correction of franchise tax arrearages, certified to the treasurer of state July 29, 1941, for the years 1935 to 1940, both inclusive, having been filed August 28, 1941, came on for consideration, and hearing having been had, the tax commissioner denies such application as of December 2, 1943.

Department of Taxation, William S. Evatt, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the department of taxation this day taken by the tax commissioner with respect to the above matter.

William S. Evatt, Tax Commissioner.

[fol. 77-A] BEFORE BOARD OF TAX APPEALS OF OHIO

PROCEEDINGS

Before Honorable William J. Ford, Chairman, Robert M. Hance and Robert H. Hoffman, Members, Board of Tax Appeals, Department of Taxation of Ohio, Thursday, September 28, 1944, at the Hearing Room of the Board of Tax Appeals, Ohio Departments Building, Columbus, Ohio.

Morning Session, Thursday, September 28, 1944.

Chairman Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio, International Harvester Company, appellant, against William S. Evatt, appellee, Case Number 7994; appeal filed by the appellant under

date of December 27, 1943, from an order of the tax commissioner under date of December 3, 1943, denying an application for a review and correction of a determination of the order of the tax commissioner, which, under the assumed authority of Section 5461, General Code, made back tax assessments of corporation franchise taxes on the appellant for the tax years 1935 to 1940 inclusive.

Appearances? Who represents the appellant?

Mr. Lewis: Edward R. Lewis, attorney, representing the appellant.

Chairman Ford: And the attorneys representing the appellee?

Mr. Graham: Thomas J. Herbert, attorney general, by Perry L. Graham, chief counsel.

Chairman Ford: Case heard before the Board of Tax Appeals at the hearing room of the board at Columbus, [fol. 78-83] Ohio, September 28, 1944, Hance, Hoffman and Ford, members present.

[fol. 83-A] CHARLES L. JOHNS, called on behalf of the appellant, being first duly sworn, testified as follows:

Examined by Mr. Lewis:

Q. Will you state your name and position?

A. Charles L. Johns. I am the auditor of tax returns of the International Harvester Company. I have held that position since 1936. That was a new position or title created at that time. However I have been employed by the company for 33 years.

Q. You have been now?

A. I have been employed, yes, and 24 years of that time I have been working on tax matters at least part of the time and for the last several years, or the last five or six years, 100% of the time. My duties at the present time are to supervise the preparation in the accounting department of all of the federal income tax returns, the federal social [fols. 84-89] security tax returns, the state income tax returns, the state franchise tax returns and certain personal property tax returns and a variety of others.

Q. As auditor of tax returns you are responsible for the state income and state franchise tax returns filed by the company?

A. I am responsible for the figures contained therein, that is correct.

Q. You are familiar with the returns the International Harvester Company has filed in the various states, are you?

A. Yes, sir.

[fol. 90] By Mr. Lewis:

Q. Mr. Johns, I hand you what has been marked for identification as Appellant's Exhibit No. 2; did you prepare that statement (handing paper to witness)?

A. Yes, sir, I did.

Q. What does it show; what does it purport to show?

A. Branches and selling locations in the United States in the years 1936 to 1939 inclusive of International Harvester Company.

Q. It shows the branches? Does it show any retail stores or motor truck sub-stations?

A. Yes, sir, it does.

Q. And it shows the states in which the International Harvester Company had no selling locations from 1936 to 1939, does it?

A. That is correct.

Q. Was that schedule prepared under your supervision or did you prepare it yourself?

A. Under my supervision.

Mr. Lewis: We offer Appellant's Exhibit No. 2 in evidence.

Mr. Graham: I object on the ground of materiality only.

Chairman Ford: What is the objection?

Mr. Graham: It is immaterial to the issues in this case.

Chairman Ford: At the present time we don't know whether it is material or not. We don't know how he did business.

Mr. Lewis: We expect to explain that.

Chairman Ford: Very well.

By Mr. Lewis:

Q. Mr. Johns, referring to Appellant's Exhibit No. 2, you list 35 states in which the International Harvester Company in the year 1936 to 1939 had branch houses. Will [fol. 91] you describe briefly to the board how the branch house operated in those years?

A. At the head of the branch house organization was a branch manager. Assisting him was an assistant branch manager, and under these two gentlemen were the complete sales and accounting organization. The branch house was usually either owned—a warehouse was maintained at each of these locations, branch house locations. It was either owned by the company or rented. The branch manager sent his salesmen out to solicit orders in the territory to which he was assigned. The orders came back to the branch and were accepted by the branch manager. The goods were either shipped from the branch warehouse or from a factory or from a transfer house of the company.

Q. Shipped on order of whom; who gave the shipping order?

A. The branch manager or someone in his organization.

Q. Someone in the branch house sent the shipping order to the factory?

A. Yes, to the factory, by way of the Chicago general office.

Q. And the goods would be shipped from the factory either to the branch or to the dealer, is that correct?

A. That is correct.

Q. Who approved the orders and contracts?

A. I already stated that, the branch manager.

Q. The branch manager; then who received the cash and notes on the sales?

A. They were received by the branch house which originally took the order.

Q. And the notes were held where?

A. The notes were held in the branch until they became [fol. 91A-95] due and then they were sent to banks for collection or collected by our own collection organization.

Q. Did the factory approve any contracts or orders, accept any orders or approve any contracts?

A. The factory didn't approve any contracts.

Q. Did it receive any cash on notes on the sales?

A. Which factory are you referring to?

Q. Any factory.

A. No factory received any cash on the sales negotiated by the branch houses.

Q. Did the Springfield Works of International Harvester Company receive any cash or notes from the sales?

A. It may have made some local sales of repair parts for which it received cash—no, it doesn't handle repairs.

Chairman Ford: What years are you talking about?

Mr. Lewis: 1936 to 1939 when International Harvester Company did its own distributing.

Chairman Ford: Is that true?

The Witness: That is true, 1936 to 1939, that is true.

Mr. Grahain: That is covered in the stipulation except as to Wisconsin and the foreign countries.

By Mr. Lewis:

Q. And for Wisconsin we show the International Harvester Company of America stayed in business——

A. Until October 30th, 1939.

Q. You are familiar with the franchise tax returns of International Harvester Company filed in the various states, are you not?

A. Yes, sir.

[fol. 96] By Mr. Lewis:

Q. Mr. Johns, you have been familiar with the franchise tax returns in the state of Ohio of International Harvester Company for the years 1934 to 1939 inclusive, the business years, fiscal years?

A. Yes, sir.

Q. You are familiar with the assessments that have been made by the tax commissioner in this appeal, are you?

A. Yes, sir.

Q. I will ask you if any deductions have been made in arriving at the assessments arrived at in this appeal [fol. 97] and any deductions have been made for goods of Ohio manufacturers sold from warehouses of the International Harvester Company outside of Ohio?

Mr. Graham: I object.

Chairman Ford: The witness may answer.

The Witness: No, sir.

By Mr. Lewis:

Q. I will ask you next if, in arriving at the assessments involved in this appeal, any deduction has been made for the value or amount of goods manufactured outside of Ohio by the company outside of Ohio and shipped direct to Ohio buyers on sales made by Ohio branches?

A. No, sir.

Q. Going back to this question of these state franchise and income taxes, I will ask you to state in how many

states, in addition to Ohio, does International Harvester Company file franchise tax returns.

Mr. Graham: I object. I don't know what difference it makes.

Chairman Ford: It may be preliminary. I thought he did answer that before.

The Witness: I answered that before.

By Mr. Lewis:

Q. In the franchise tax returns of the International Harvester Company in reporting sales in the state, the total sales in those franchise tax returns, I will ask you if in any case International Harvester Company has excluded sales of goods of Ohio manufacturers.

Mr. Graham: I object.

Chairman Ford: We will sustain the objection. You may proffer the evidence.

[fol. 97-A] Mr. Lewis: We propose to prove by the answer to this question that in the franchise tax returns in the states that the witness has testified to, that the company makes franchise tax returns, it has included as sales in the taxing state all sales made by the branches in that state either to those who are residents of the state or to buyers wherever resident, according to the requirements of the state, and not only that but all sales made by the branch, irrespective of the place of manufacture.

Chairman Ford: On that point let me ask you, do you in any of your tax reports make any return as to sales of goods in any particular state which is manufactured in other states? Do you make a return of your sales in such case in any other instance except where the law of that state requires you to do it?

The Witness: I don't know of any law where we are not required to do it.

Chairman Ford: The answer is you do not make it unless the law of that particular state requires you to make the return?

The Witness: That is right, yes, sir.

Chairman Ford: Whatever you include in that return is that which is required by the law of that state?

The Witness: Yes, sir.

By Mr. Lewis:

Q. The company in these nine states files franchise tax returns in each state, part of which is based upon sales in the state total sales?

Mr. Graham: I object.

The Witness: That is correct.

Chairman Ford: Proceed. Let the answer stand.

[fol. 98] By Mr. Lewis:

Q. Mr. Johns, to make that clear before the board, do I understand that in reporting sales in the franchise tax returns the question of sales in the state is governed entirely by the question of which branch made the sales and not by the question of where the goods were manufactured?

A. That is correct.

Mr. Graham: I object.

Chairman Ford: Objection overruled.

By Mr. Lewis:

Q. Referring to these state income tax returns, I believe you testified that in 32 states and the District of Columbia, International Harvester Company in 1939 filed state income tax returns?

A. That is correct.

Q. I will ask you if on those returns in each case in each of those 32 states and the District of Columbia the sales of the company in that state and the District of Columbia are not an element—I will ask you if on the income tax return in those 32 states and the District of Columbia if the element of sales in that state and the District of Columbia—if the amount of sales in that state and the District of Columbia is not required to be returned?

Mr. Graham: I object.

Mr. Lewis: I will withdraw the question.

Chairman Ford: Very well.

By Mr. Lewis:

Q. I will ask you in the state income tax return in those 32 states and the District of Columbia if the International Harvester Company on the returns supervised by you did not in each case report sales in that state on those returns?

[fol. 98-A] Mr. Graham: I object.

Chairman Ford: The answer to the question will be taken subject to reservation. It will be decided on the merits of the case. We don't know what the Supreme Court is going to say and so we will take it subject to reservation.

The Witness: Sales were reported in each one of those state income tax returns.

By Mr. Lewis:

Q. And the sales that were reported were the sales made by branches in the state?

A. Yes, sir.

Mr. Graham: I desire to object to all this line of testimony.

Chairman Ford: The answer is the same; you don't return anything on those income tax returns by way of income or receipts that the law doesn't require you to return, the law of that particular state?

The Witness: That is true, but we are seeking here the allocation formula only.

By Mr. Lewis:

Q. I will ask you if in the case of any one of these 32 states and the District of Columbia any amount of sales was excluded from sales of that state because the goods were not manufactured in that state?

A. No, sir.

Mr. Graham: Does the record show a continuing objection?

Chairman Ford: Yes, and the record shows that we are taking these answers to these particular questions subject to reservation.

Mr. Lewis: You may cross examine.

[fol. 99] Cross-examination.

By Mr. Graham:

Q. Mr. Johns, in 1935 did you prepare the return of the International Harvester Company for the purpose of state franchise tax in Ohio?

A. That is based on 1934 figures? It was prepared by one of my men. I am familiar with it.

Q. Did you file it? When were you first the tax auditor of this company?

A. I first had that title in 1936, but I was doing this same kind of work.

Q. You were familiar with the preparation of the return as filed in 1935, were you?

A. Yes, sir.

Q. And were you familiar with the return for the year 1936 when it was filed?

A. That is the return for 1936 based on 1935 figures? We seem to be getting mixed up here. That is based on 1935 figures. I am familiar with that also.

Q. Were you familiar with it at the time it was filed?

A. Yes, sir.

Q. Were you familiar with the annual report filed by the appellant for the year 1937?

A. Yes, sir.

Q. At the time it was filed?

A. Yes, sir.

Q. I will ask you the same question with respect to the annual report of the company filed for the year 1938; were you familiar with that at the time it was filed.

A. Yes, sir, I was.

Q. I will ask you also whether you were familiar with the annual report of the appellant filed for the year 1939 at the time it was filed?

A. Yes, sir.

[fol. 99-A] Q. I will ask you also with respect to the annual report filed for the year 1940, whether or not you were familiar with that report at the time it was filed.

A. Yes, sir.

Q. After those returns were filed did you file any further papers with respect to those returns?

A. Not until after Mr. Foley came in and made an examination.

Q. Mr. Foley made an examination; what kind of an examination did he make?

A. Mr. Foley came in and I just can't recall how much he went into our records, but he asked us for a lot of additional information that was very difficult to get because it was information that we didn't have readily available on our

records, so I think you have all of Mr. Foley's files, and it will show that that information was furnished and the dates and what it was all about.

Q. You furnished him with further information with respect to your corporation, did you?

A. Yes, sir.

Q. And was that taken from your records?

A. It must have been taken from our records, yes.

Q. You gave him certain information for the purpose of his examination, did you?

A. That is right.

Q. In connection with the examination?

A. That is right.

Q. Did you give him any figures that were incorrect?

A. We gave him some figures as I remember, motor truck shipments and average price of trucks or total volume of sales or something, from which Mr. Foley determined an average price per unit.

Q. Did you give him any information that was incorrect?

A. No, sir. I am trying to explain—o. k.

[fol. 100] Q. In 1940 did you have any conferences with Mr. Foley in connection with these returns?

A. We had in 1940 in the offices at Chicago, in December of 1940. That was when he made his examination.

Q. He made the examination then in December of 1940?

A. Yes, that is right.

Q. Did you have any further conferences with Mr. Foley after December, 1940, with respect to these returns?

A. Yes, sir.

Q. I am handing you the board's transcript furnished by the tax commissioner and I will ask you to examine the correction sheets and I will ask you if you ever received a copy of those (handing documents to witness).

A. Yes, sir, I received all those.

Q. After that did you have some further discussion or controversy with Mr. Foley or with somebody else in the tax department with respect to those returns?

A. We had very little correspondence after that and no conferences after that.

Q. Did you ever get any correction sheets after that time?

A. No, sir.

Q. I am handing you herewith a paper marked for purposes of identification as Appellee's Exhibit A, and I will ask you if you have ever seen that or a copy of it (handing paper to witness).

A. Yes, I have seen a copy of it.

Q. Did you have a conference with Mr. Foley or with anybody else at the time—at or about the time that corrected sheet was put out?

A. As I recall, no, sir.

Q. Handing you the Board of Tax Appeals' transcript, the tax commissioner's transcript filed with the Board [fol. 100-A] of Tax Appeals, calling your attention to line 17, item 17——

A. What year is that?

Q. Being the corrected sheet for the year 1935, I will ask you to examine line 17 being labeled "Amount of Ohio Business", the item in this first column——

Chairman Ford: What are you referring to, Mr. Graham?

Mr. Graham: The correction sheet which is in the transcript with respect to the year 1934.

Chairman Ford: The tax year 1935 and business done in 1934?

Mr. Graham: As of the year ended December 31, 1934, appearing in the column headed "As corrected $25,841,096."

Chairman Ford: Very well.

By Mr. Graham:

Q. I call your attention to line 17, being the item labeled "Amount of Ohio business as corrected" under the column "As corrected $17,377,675". I will ask you whether you had any conference or hearing prior to that correction.

A. Yes, we did. We had a conference here in Columbus and we had some correspondence in the intervening period before December, 1940, and at the time this assessment was made.

Q. You had correspondence?

A. Correspondence and also a conference.

Q. Do you remember what your claim was for the reduction?

A. I certainly do.

Q. What was it?

A. In the first place Mr. Foley got an average price, average selling price of motor trucks which was based—which he arrived at by taking our motor truck sales, divid-
[fol. 101] ing it by the total units sold and he arrived at an average price. Then he took the number of Springfield units sold and applied that average price against it. That distorted the sales of the Springfield product because at Springfield we make only small trucks while at Fort Wayne we make big trucks, and the average for Springfield was thereby increased over what it should have been, so that was called to Mr. Foley's attention, and that was called to his attention I think at a conference here in this building, and then we went back to Chicago and we gave Mr. Foley a different figure. We took our total sales proceeds of motor trucks and we were able to divide that between the Springfield product and the Fort Wayne product. I am speaking of total proceeds, everything all over the United States that the company sold. We divided that total between Springfield and Fort Wayne, and Mr. Foley included the entire proceeds from the sales of Springfield trucks in this assessment.

Chairman Ford: In the corrected unit price?

The Witness: No, sir, I disregarded the unit price. We had the total sales of motor trucks in the United States divided between the Springfield product and the Fort Wayne product.

By Mr. Graham:

Q. As a matter of fact you also had further conferences with him with respect to what you claim were sales made from warehouses outside the state and you claimed that those were exempted under the rule of the tax commissioner, didn't you?

A. We didn't have any further conference.

[fol. 101-A] Q. At that conference?

A. Yes, at that conference I think that matter was brought up.

Q. And he made you an allowance for that at that conference, didn't he?

A. Oh, no, he didn't make any allowance.

Q. In making the corrections there were corrections made at that same time with respect to the subsequent years, weren't there?

A. Yes, there were corrections made when he got my revised figures, which were correct figures for the total sales of the Springfield product; he sent in these corrected assessments and they brought it down from 271,000 to 164.

Q. I will hand you herewith certain papers which for identification have been marked as Appellee's Exhibits B, C, D, E and F, and I will ask you whether you ever received copies of those (handing papers to witness).

A. Yes, sir, I received copies of those.

Q. Those are the correction sheets upon which the tax was paid from which you filed this appeal, isn't that right?

A. Yes, sir.

Mr. Graham: May we offer these in evidence as part of our cross examination?

Chairman Ford: Do you want to offer them now?

Mr. Graham: I think they should be in as part of the cross examination.

Chairman Ford: Is there any objection?

Mr. Lewis: I have no objection.

Chairman Ford: Then they may be admitted.

And thereupon the documents above referred to are admitted in evidence on behalf of the appellee, and are [fol. 102] herewith submitted and marked respectively Appellee's Exhibits A to F inclusive.

By Mr. Graham:

Q. Mr. Johns, what is the nature of your job with the International Harvester Company; you are in the accounting department, aren't you?

A. That is right.

Q. You deal in what, tax work, exclusively since——

A. Since 1936 approximately 100%.

Q. Approximately 100% in that work, tax work, since that time?

A. Yes, sir.

Q. Prior to 1936 I understood you to say you did substantially the same work during 1935.

A. That is right, all the way back——

Q. But you didn't have the title?

A. I didn't have the title.

Q. In 1934 and 1935 you did the same work and substantially 100% of your time was devoted to tax work for the International Harvester Company?

A. Not in 1934 and 1935 it wasn't.

Q. What did you do in 1934 and 1935 other than tax work?

A. A lot of other general accounting work.

Q. So that after 1936 in addition to having the accounting, you got rid of a lot of this accounting work.

A. Yes, sir. I used to do the tax work and the other work too. The work has just about trebled.

Q. You don't have any functions in connection with the manufacturing business other than the tax accounting, do you?

A. None whatever.

Q. Your duties during 1934 and 1935 were purely accounting, were they?

A. Purely accounting.

[fols. 103-105] Q. That is on tax and other accounting that they happened to dump on your lap?

A. That is right.

Q. You never worked in the sales end of the company, did you?

A. Yes, I have.

Q. I mean during 1934——

A. I misunderstood you. I am answering your question too hurriedly. I never worked in the sales department of the company.

Q. Your experience was as an accountant?

A. I have worked in sales accounting.

Q. But not in the sales department selling goods?

A. Not selling goods, no.

Q. Outside of your experience with the other part of the company's operations, it is purely from an accounting view, is that correct?

A. That is correct.

[fol. 106] Chairman Ford: Is the same answer given by you with respect to the original franchise tax correction sheet for the business year 1936, would apply both with respect to what you included as Ohio business and as to the discrepancy between the amount of Ohio business first stated by Mr. Foley and the amount of Ohio business stated by Mr. Foley in what is now known as Appellee's Exhibit C? In other words, the same answers obtain in that year?

The Witness: No, sir; no, they do not because what we reported as Ohio business in 1936—I am looking now

at line 17, amount of Ohio business, $8,546,000, and in that year the International Harvester Company of America went out of the picture. All the sales were made in Ohio by the International Harvester Company itself through its own branches, so in that figure of $8,546,000 we have $7,951,000 of sales made by International Harvester Company branches to customers within Ohio, [fol. 107] plus works collateral sales at $595,000. That makes that $8,546,000. The other remarks that I made, Mr. Foley took his figures from the letter I sent him, the sales that my letter shows. It shows $34,756,000. Those were total sales of Springfield products, and from that figure was deducted in that assessment, in order to correct the duplication, the sales of Springfield product by Ohio branches. The first figure, including the Ohio branches, then is taken as the sales of Springfield product by Ohio branches, $1,708,000. That brings the figure down to $33,047,000. To that figure is added the figure that we reported in our return, $8,546,000.

Chairman Ford: The company reported for the business year 1936 not only motor trucks that were manufactured by the company over at Springfield but all kinds of goods and equipment that were sold by the company through its branch agencies here in Ohio?

The Witness: That is correct; that is—sold by its branches in Ohio to Ohio customers only.

Chairman Ford: As I understand it, going over to the corrected figure set out in Exhibit C, his figure as to the total amount of Ohio business, to wit, $41,594,703, that is the figure given by him?

The Witness: That is correct.

Chairman Ford: How much of that amount of business as represented by those figures was represented by motor trucks that were manufactured over at Springfield and sold that year everywhere?

The Witness: How much of that $41,594,703 sold everywhere?

Chairman Ford: Yes.

[fol. 107-A] The Witness: $34,756,000.

Chairman Ford: That represented motor trucks for that end of that fiscal year, which was October 31, 1936?

The Witness: That is right.

Chairman Ford: Represented the sale value of trucks manufactured at Springfield and sold in Ohio and everywhere else?

The Witness: Yes, sir.

Chairman Ford: How much of that figure that you have just given me, $34,756,000, how much of that figure was represented by the value of trucks manufactured at Springfield and sold in Ohio, delivered to branches and sold by Ohio branches.

The Witness: About $1,709,000.

Mr. Graham: That is approximately?

The Witness: $1,708,790 is what it shows on the record here.

Chairman Ford: The balance of that particular figure is represented by the value of trucks manufactured at the Springfield plant and sold to states and countries other than Ohio?

The Witness: Yes, that is correct.

Chairman Ford: And in that last figure with respect to the Springfield trucks sold or delivered to states and countries other than Ohio, such goods were shipped to whom?

The Witness: They were either shipped from the Springfield plant to the company's own warehouses located all over the United States or to the company's dealers in the United States or to the I. H. Company of America's branches that were operating only in the [fol. 108] state of Wisconsin at that particular time, or to the I. H. Company of Canada, Limited, a Canadian subsidiary, or to the I. H. Export Company which handles the export business.

Chairman Ford: This question, if there is any objection to it, will be taken subject to reservation and we will decide it later, and I want you to answer this only if you know; speaking with respect to the valuation of that part of the total Springfield truck business indicated by trucks sold and delivered by and/or delivered to states and countries other than Ohio, do you know how much of that figure as included and reported by Mr. Foley in this Exhibit C represented the amount and value of Springfield trucks that were shipped and delivered to the company's warehouses in these other states and sold from such warehouses?

The Witness: No, sir, I don't know the exact amount.

Chairman Ford: Do you know whether that was included or excluded from Mr. Foley's figures?

The Witness: I know it is included here because I have given Mr. Foley the total proceeds shown by the company—the total sales of motor trucks made by the company. Mr. Foley nowhere has made any deduction for goods sold from the warehouses outside the state of Ohio. He has included the total sales of the Springfield product.

Chairman Ford: Is there any breakdown in those figures with respect to this item?

The Witness: No, sir, we have no breakdown.

Chairman Ford: You can explain the answer.

[fol. 108-A] The Witness: The only way that we could get a figure like that would be to have every one of our branches all over the United States,—and during that period we had over one hundred,—they would have to examine every sales invoice that they have in their files for each one of these years to determine whether it went to a customer—to determine whether it was shipped from Springfield direct to the customer or from their own warehouse direct to the customer. That would all have to be tabulated and it would be a tremendous job for 100 branch houses to do, and the only other way to do it would be to do it on a percentage basis, find out what the percentage is of shipments going out from Springfield direct to dealers, and in order to do that you would have to examine the whole year of Springfield shipments.

Chairman Ford: Well, at any rate you did not give Mr. Foley a breakdown on that?

The Witness: No, sir, we didn't give him a breakdown.

Chairman Ford: And you don't have those figures in your own files?

The Witness: No, sir, they are not available because those invoices for 1936 have been destroyed long ago.

Chairman Ford: Are those figures available for any subsequent years?

The Witness: All we have for the year 1939 is a tabulation wherein there were about 56,000 invoices examined covering shipments for the year 1939, and it shows how many trucks were shipped out of Springfield to dealers and customers and how many were shipped to branch warehouses of the company itself. That is the only thing we have available.

[fol. 109] Chairman Ford: We will get to that in a minute. Now referring, Mr. Johns, to Mr. Foley's original franchise tax correction sheet, which is a part of the tax commissioner's transcript as filed by the Board of Tax Appeals, I notice that in line 17 against the item "Amount of Ohio business", Mr. Foley has noted as the amount of Ohio business reported by the company the sum of $11,654,962. Do you have those figures?

The Witness: That is for the year 1937?

Chairman Ford: The business year 1937.

The Witness: Yes, sir.

Chairman Ford: Or rather the fiscal year ending October 31, 1937.

The Witness: $11,654,000, I have it.

Chairman Ford: Has Mr. Foley correctly reported that item as the amount reported by the company?

The Witness: Yes, sir.

Chairman Ford: Can you tell us what was included in that item in the way of business of the company in Ohio?

The Witness: Yes, sir, it was $10,391,000 of sales by Ohio branches of the company to Ohio customers. There was an amount of $212,000 which represented sales of the Greenville, Ohio, and Van Wert, Ohio, retail stores which were operated by branch houses located outside the state of Ohio, but they were Ohio business, so they are in here, $212,000. In addition to that there is $1,051,000 of this general collateral sales business made by the Springfield works.

Mr. Graham: What do you mean by "collateral sales"?

The Witness: Castings and so forth. That brings up the total to $11,655,000 or 654,000.

[fol. 109-A] Chairman Ford: Now included in that total figure as reported by the company for the tax year 1938 I presume, but based upon the business of the fiscal year ending October 31, 1937, how much of that was represented by Springfield trucks, trucks manufactured at Springfield which were sold in Ohio?

The Witness: That figure would be comparable to the $1,708,790 which I gave you for 1936. The corresponding figure for 1937 was $1,967,693.

Chairman Ford: That represents Springfield trucks sold in Ohio?

The Witness: Yes, sir.

Chairman Ford: Sold to or through dealers in Ohio?

The Witness: Sold by the branches to dealers and customers in Ohio.

Chairman Ford: As I understand in that connection the dealer is in all instances an independent operator?

The Witness: Yes, sir.

Chairman Ford: He has no connection with the company?

The Witness: No, sir.

Chairman Ford: He is not an agent in any sense of the word?

The Witness: No, sir.

Chairman Ford: Against that same line or in that same line 17, the amount of Ohio business, I notice in this same correction sheet for the fiscal year 1937 the figure of $65,110,049. As against that I notice that in Appellee's Exhibit D, which is over the signature of Mr. J. W. Foley, that figure is given as $51,115,516. If you know you may state what were the facts and cir- [fol. 110] cumstances that accounted for that difference in the correction as made?

The Witness: The facts are similar to those given for the year 1936. Mr. Foley used the information set in my letter which is in evidence as Exhibit G, and he started out with the figure I gave there on the first page of that exhibit, $41,428,000, which was the total sales of Springfield product everywhere, and then the other remarks that I made about 1936 apply equally well to 1935. The amounts are a little different, but the ideas are the same, the same procedure.

Mr. Graham: That is also true of 1938 and 1939, isn't it?

The Witness: Yes, sir.

Chairman Ford: Included in this figure of $51,115,516, as set up by Mr. Foley, I assume, as in other years, was included the amount and value of the Springfield trucks that were sold in Ohio and elsewhere?

The Witness: That is right.

Chairman Ford: Of that figure how much of the total figure is represented by the amount and value of Springfield trucks delivered to points outside of Ohio?

The Witness: Delivered to points outside of Ohio? This is 1937?

Chairman Ford: The fiscal year 1937.

The Witness: That would be the difference between—that is $39,460,554.

Chairman Ford: And as in the previous year these deliveries were sent out on orders sent in to you by whom?

[fol. 110-A] The Witness: By the branch houses located all over the United States.

Chairman Ford: And they were sent out on orders made by the branch houses all over the United States—we are talking about other than Ohio now—and pursuant to those orders the trucks were delivered to whom and how?

The Witness: Some were delivered to dealers of the International Harvester Company; some were given direct to branch houses and some went through the International Harvester Export Company to be sold abroad; some went to the International Harvester Company of Canada, Limited, and some to the International Harvester Company of America, which was operating only in the state of Wisconsin.

Chairman Ford: What is meant by the term "warehouse" as used in connection with business such as done by the International Harvester Company?

The Witness: Well, we have what we call a warehouse here in Columbus. The warehouse, together with the organization who operates and the selling organization, constitutes what we call a branch house or a branch house organization. In this warehouse we store all kinds of implements and trucks in some of them, and large stocks of repair parts to service the surrounding community.

Chairman Ford: Does the company in all instances either own or rent the building and operate the warehouse, so-called?

The Witness: Yes, sir.

[fol. 111] Chairman Ford: It is not transacted by an independent person?

The Witness: No, sir, we have our own employees at all of these locations who are in charge of the company's business.

Chairman Ford: Is it anything more than a sales room, this warehouse you speak about?

The Witness: Oh, yes. We might stock several carloads of tractors in there or several carloads of binders or mowers or reapers or manure spreaders.

Chairman Ford: Are your products handled in any case by transfer agents under independent contracts?

The Witness: I don't know of any. It is not the prevailing practice. There may be an isolated case where we might have a transfer agent. I seem to recall that we did have one recently down in South Carolina, but I think that is out of the picture now. We didn't have a branch in South Carolina, so I believe we had a transfer agent there for a short period of time.

Chairman Ford: Well, I don't want to take up too much time. Yet we must have the facts in the record somehow. Referring to the tax commissioner's correction sheet for the fiscal year ending October 31, 1938, the tax year 1939, I note that in line 17 as an item of Ohio business Mr. Foley, the tax commissioner's representative, sent out the amount as reported by your company in the sum of $7,734,203.

The Witness: That is correct.

Chairman Ford: What does that include?

The Witness: That consists of sales to Ohio customers by Ohio branches of the company in the amount of [fol. 111-A] $7,103,000, and that includes sales of all products, motor trucks and everything else, plus retail sales made at our Van Wert and Greenville stores which are operated by branches outside the state of Ohio, in the amount of $119,000.

Chairman Ford: How much of that—

The Witness: And there is one more figure, some more of these works collateral, $512,000. That should make up the total of approximately $7,734,000.

Chairman Ford: How much of that figure is represented by the amount and value of Springfield trucks sold in Ohio?

The Witness: $1,360,474.

Chairman Ford: Going to the first correction sheet made by Mr. Foley, the agent of the tax commissioner, I note that the amount of Ohio business which he set up was $47,163,912, and that as against that in his second correction sheet, which is in evidence as Appellee's Exhibit E, he set out the amount of Ohio business as $38,251,671. Do you have that figure before you?

The Witness: Yes, sir.

Chairman Ford: What is the explanation with respect to the reduction in those figures made by Mr. Foley?

The Witness: The same explanation would apply as applied to the years 1937 and 1936.

Chairman Ford: Very well. Taking this figure $38,251,671 as Mr. Foley's statement of the amount of Ohio business for that fiscal year ending October 31, 1938, how much of that item is represented by Springfield trucks sold and delivered out of the state of Ohio?

The Witness: That is $30,517,468.

[fol. 112] Chairman Ford: Speaking with respect to those Springfield trucks sold or delivered outside of the state, to whom and how were they delivered and on whose orders, if any?

The Witness: They were delivered principally on orders of the branches for shipment to the branch house warehouses or to dealers of the company. In addition we still have those shipments going to the International Harvester Company of America, the International Harvester Company of Canada and the International Harvester Export Company. The International Harvester Company of America was operating only in the state of Wisconsin at that time.

Chairman Ford: During those years in which the International Harvester Company of America was operating as a sales representative, so to speak, of the manufacturing company in the state of Wisconsin, what was the modus operandi with respect to the delivery of Springfield trucks from the manufac' ring company to the International Harvester Company of America?

The Witness: The American company purchased those trucks f. o. b. the factory at Springfield.

Chairman Ford: Do you have any breakdown for these several years with respect to those sales that were made to the International Harvester Company of America, for the years 1936 on?

The Witness: Yes, those are separated. Those are available in Exhibit G.

Chairman Ford: Very well, and there are no figures for this year I am talking about with respect to the [fol. 112-A] amount and value of sales made outside of the state of Ohio from warehouses?

The Witness: No, sir.

Chairman Ford: Coming to first the fiscal year ending October 1, 1939, Mr. Foley, as the agent of the tax commissioner, in his first correction sheet stated that the

amount of Ohio business as reported by your company for the tax year 1940 was $8,125,736?

The Witness: Yes, sir.

Chairman Ford: Was that correctly reported as the amount of business done in Ohio for the fiscal year 1939?

The Witness: Yes, sir, that is what we reported.

Chairman Ford: That included what?

The Witness: $7,356,000 of that amount represented sales in Ohio by Ohio branch houses of the company, and that included of course all products as well as motor trucks. $50,000 represented sales made by the Van Wert retail store. $719,000 represented sales of works collateral, and the total $8,125,736.

Chairman Ford: Do you have a breakdown as to the amount and value of Springfield trucks in that item?

The Witness: The sales of Springfield trucks by Ohio branches amounted $1,858,184.

Chairman Ford: In his first correction sheet Mr. Foley set out the amount of Ohio business in the sum of $56,812,961, and as against that in the second correction sheet, which is in evidence as Appellee's Exhibit F, he set out the amount of Ohio business as $43,303,316. Do you have those figures?

The Witness: Yes, I see those figures.

[fol. 113] Chairman Ford: How is the difference in those figures accounted for?

The Witness: The same explanation applies to 1939 as applies to 1938, 1937 and 1936.

Chairman Ford: Very well. Now taking the corrected figure of Mr. Foley as the statement of the tax commissioner with respect to the company's Ohio business for the fiscal year ending October 31, 1939, to wit, $43,303,316, do you know what the different kind of transactions were that were included in that figure given by Mr. Foley?

The Witness: Yes, sir.

Chairman Ford: Well, if you know, state them.

The Witness: Mr. Foley started out by taking the total sales of the Springfield product, $37,035,764. Then he deducted from that the sale of Springfield product by Ohio branches of $1,858,184.

That left the sum of $35,177,580, to which he added the Ohio business as was reported at $8,125,736, giving the total Ohio business $43,303,316.

Chairman Ford: Included in that figure you state the amount and value of Springfield trucks which were delivered outside of Ohio?

The Witness: Yes, sir.

Chairman Ford: What is that figure?

The Witness: $35,177,580.

Chairman Ford: And as to the Springfield trucks which went out of Ohio, they were delivered on whose orders and they were delivered in what manner and to whom?

[fol. 113-A] The Witness: They were delivered on orders received from the company's branch houses located all over the United States to the company's warehouses or to the company's dealers or delivered to the International Harvester Company of America, operating only in Wisconsin, the International Harvester Company of Canada, Limited, or the International Export Company.

Chairman Ford: As to this year you say you do have something in the way of a breakdown as to the amount of the Springfield trucks that went to warehouses or some similar repositories?

The Witness: Yes, sir.

Mr. Lewis: I was going to identify that by a later witness.

Chairman Ford: Then amplifying this last question or explaining the last question and your answer thereto, do I understand the fact to be that there has been a compilation made covering the facts requested in that question, is that so?

The Witness: Yes, sir.

Chairman Ford: And those facts should be given by some other witness rather than yourself?

The Witness: Yes, for the reason that this compilation was made at our Springfield plant here in Ohio.

Chairman Ford: Very well, that is all I have.

By Mr. Graham:

Q. Mr. Johns, you testified on a question from Judge Ford with respect to deliveries made from your Springfield plant. Is it not true that on some occasions one of your dealers or branches has an order and he sends it in and you ship the thing or things to them for delivery?

A. One of our dealers?

[fol. 114] Q. One of your dealers or branches? Suppose you have a branch up in Minnesota that makes an order for a certain type of truck and sends the order in to you and you send it to him and he makes the delivery.

A. You mean the dealer makes the delivery?

Q. Yes.

A. You mean a customer in Minnesota?

Q. I will withdraw the question. Suppose your dealer or your branch office in Minnesota procured an order for one of your trucks manufactured at Springfield.

A. Yes, sir.

Q. And he would send the order in to you, how would you bill that order?

Chairman Ford: You mean at Chicago.

The Witness: You mean at Springfield?

By Mr. Graham:

Q. Yes.

A. The chances are the order would be filled by direct shipment to the dealer.

Q. Do you know of transactions of that kind where he gets an order and he sends it to the particular branch or particular office and then they send it down to Springfield for filling?

A. Yes, we have transactions like that too, but we have shipments that go direct to dealers, quite a lot worked out in the way you asked about in your question.

Chairman Ford: Do I understand in that case a dealer could deal directly with the company over here at Springfield and get a truck without the branch manager knowing anything about it?

The Witness: No. I understood the dealer sent the order to the branch but the branch forwarded it to Springfield and then Springfield shipped it to the dealer.

[fol. 114-A] Mr. Hance: Who do you bill for it?

The Witness: The dealer would be billed by the branch house.

Mr. Graham: That is all.

Redirect Examination

By Mr. Lewis:

Q. I am not sure I understood you. Did I understand Mr. Graham to ask you if the dealer in Wisconsin sent

an order for a truck—I thought he said to the general office in Chicago——

A. He didn't mean that.

Mr. Graham: It doesn't make any difference where it went.

The Witness: The dealer sends that order to the branch house. The branch house sends it to the Springfield plant and the Springfield plant ships it direct to the dealer and the branch house in Minnesota bills the dealer and collects the money.

By Mr. Lewis:

Q. I think in answer to a question by Mr. Ford or Judge Ford, you referred to the sales by International Harvester Company in 1934 and 1935. I think I might explain to the board—I think there was some question about the sale of agricultural implements in those years. Explain to the board who made the sales of the agricultural implements in 1934 and 1935.

A. The International Harvester Company of America was operating in the state of Ohio in 1934 and 1935, and it reported in its franchise tax return all of the sales, not only——

Mr. Graham: I object and move to strike the answer from the record, what is reported in its return.

[fol. 115] Chairman Ford: We will assume that it complied with the law.

By Mr. Lewis:

Q. Mr. Johns, have you got a list of the states in which International Harvester Company in 1939 filed income tax returns and paid income taxes for the year 1939?

Mr. Graham: I object to the question.

Mr. Lewis: We withdrew two exhibits and then I asked some questions of Mr. Johns on direct examination. We have a right to show how many states we filed income tax returns in and paid income taxes in. We have got in evidence what states we paid franchise taxes in.

Chairman Ford: Well, as one member of this board, I don't think that evidence is competent. I don't know what the other members of the board think, but I think the safe thing to do is to take that under reservation and get along here.

Mr. Graham: It will go in subject to my objection, will it?

Chairman Ford: Yes, subject to the objection and ruling on the question. Ruling on the question is reserved.

The Witness: Did your question specify the year?

Mr. Lewis: I asked for 1939.

The Witness: The states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin and the District of Columbia.

[fol. 115-A] Q. From your knowledge and experience in handling the income tax returns of International Harvester Company in these years, does the same situation apply to 1936, 1937 and 1938, the same state?

A. Does the same situation apply to what year?

Q. Would the answer as to 1939 be true as to 1936, 1937 and 1938?

A. Generally speaking, yes.

Chairman Ford: Let that question go in subject to the same objection.

Mr. Graham: I understood my objection was to all of this line of questioning.

Chairman Ford: That is right: You may proceed, Mr. Lewis.

A. L. Vierling, called on behalf of the appellant, being first duly sworn, testified as follows:

Examined by Mr. Lewis:

Q. Will you state your name and the position you hold with the International Harvester Company and briefly your duties?

A. A. L. Vierling. I am the works auditor and have been in that position for approximately eight and a half years and with the company thirty-three years.

Chairman Ford: What kind of an auditor?

The Witness: Works auditor. That goes along with the Springfield Works. I am in charge of all matters in connection with the timekeeping and payroll and paying of wages, employees, the approving of all invoices for goods purchased, the compilation of material, labor and overhead [fol. 116] costs of the product we make, in charge of shipping records, in charge of the annual inventory both as to the physical count and the valuation.

By Mr. Lewis:

Q. Have you made an investigation of the shipments of Springfield motor trucks in 1939 showing the number of those shipments that went direct to branches of International Harvester Company and the number of those shipments that went direct to dealers of International Harvester Company?

A. We compiled such a statement.

Mr. Lewis: I ask that this paper be marked for identification as Appellant's Exhibit No. 5.

And thereupon the document above referred to was marked for purposes of identification herein as Appellant's Exhibit No. 5.

By Mr. Lewis:

Q. I hand you a paper which has been marked for identification as Appellant's Exhibit No. 5, and I will ask you to tell the court what that exhibit is (handing paper to witness).

A. This exhibit was compiled under my supervision, and in order to compile the sheet it was necessary for us to examine approximately 58,000 property invoices issued to our branch houses, and this to determine how many of our motor trucks were shipped to dealers and customers from the plant and how many were shipped to the branch houses of the International Harvester Company.

Q. This covers what year?

A. The year 1939, the fiscal year of 1939.

Q. How many invoices had to be examined?

A. Approximately 58,000.

Q. How many working hours would that mean of clerical——

[fol. 116-A] Mr. Graham: I object to that.

Chairman Ford: The objection is sustained.

Mr. Lewis: I think it is pertinent to show whether this Rule No. 275 is adapted to modern business, whether it is a reasonable rule.

Chairman Ford: Go ahead. I don't believe this question is particularly material.

Mr. Lewis: I will withdraw the question.

Chairman Ford: Very well.

By Mr. Lewis:

Q. Have you got the invoices for the years 1938, 1937 and 1936 from which a similar compilation could be made?

A. They have been destroyed.

Q. When were they destroyed?

A. I can't answer that question with any sure knowledge. We have a system in our plant that records are kept, various records, for various lengths of years, and I am sure that these records are not kept for any such length of time as ten years, but I can't answer the question as to just — year each year was destroyed.

Q. From your experience as works auditor of International Harvester Company at the Springfield Works, in your opinion would the situation be generally approximately the same for the years 1936, 1937 and 1938, as this exhibit shows?

Mr. Graham: I object.

Mr. Lewis: We offer the exhibit in evidence.

Mr. Graham: I object to the introduction of it.

Chairman Ford: On what ground?

Mr. Graham: What materiality does it have? What difference does it make? You have got here a bunch of figures that he says were shipped direct to the cus- [fol. 117] tomer. He ships some to the branch warehouses of International Harvester Company. For what purpose? If they are to be taken there to be stored and sold afterwards, that is one thing, and if they were not shipped in that manner, that is another thing. The witness testified that they shipped some of them on an order which was sent in to one of these branches, and he testified that they were sent—if I lived in Minnesota and wanted to get certain type of truck I could place my order and send it to the branch warehouse and the branch warehouse would send it to the Springfield plant and they would make the

delivery. It isn't broken down sufficiently to be of any value.

Mr. Lewis: Rule No. 275 states: "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

On this point we are not admitting the rule at all. We are trying to apply the rule. We have an exhibit that shows for the year 1939, 62% of the Springfield trucks shipped out went to warehouses of the company all over the United States. They are bound to be sold from the warehouse floor, and 37% were shipped direct to dealers and customers and are bound not to be sold from the warehouse floor. If they went to the warehouses they could not be sold except from the warehouse floor.

Chairman Ford: Is there any breakdown in this exhibit with respect to the number of trucks that were shipped to warehouses in Ohio and those shipped to warehouses outside of Ohio?

[fol. 117-A] The Witness: No breakdown has been made. No breakdown can be made.

Chairman Ford: In my mind the most serious question presented here is the question of competency. There is no question but what this man, as a competent party, could go through these records that he speaks about and make the compilation which is presented here for the benefit of the court, of a court or of a tribunal with quasi-judicial powers, but I don't understand how the attorney for the appellee could cross examine this man without having those records available.

Mr. Lewis: Well, with 60,000 invoices to examine—it has been a well-established rule that where there are voluminous records, too voluminous to bring into court, that a competent witness can make a compilation and testify to it.

Mr. Graham: So far as the records are made available in the court room to cross examine from.

Chairman Ford: Let us see how that rule in Ohio goes. That rule is well recognized in Ohio. We are doing it every day, having witnesses make a compilation of this kind for the benefit of this tribunal, but in all those cases we have had here, as far as I know, the records have been

available for the board or counsel on the other side or for counsel for the appellant.

The general rule is stated in Ohio about like this: "It is a generally accepted rule that where books, records and papers which might properly be used in evidence are numerous or voluminous, it is competent for any qualified person who has examined them to testify as [fol. 118] to the result of his examination—give a general summary thereof. The existence of such a rule is recognized by the Ohio Supreme Court in a decision dealing with the admissibility in evidence of the contents of an account which was beyond the jurisdiction of the court.

"In the absence of some special reason, the testimony of private auditors and of accountants is inadmissible to show the contents of original accounts or books. Such evidence may, of course, be the best evidence which can be produced of lost or destroyed books and accounts, and admissible as such. And the general rule is that in the sound discretion of the court, where books and documents of account are numerous and voluminous, the testimony of a competent expert accountant as to the result of his examination of the books is admissible, though in such case the books and documents must either be first offered in evidence, or be in the custody of the court so that the opposite party may have the opportunity, by examining the originals, to verify the correctness of the abstract and schedules thereof, offered against him. Thus, the record or the abstract of books of account which contain more than 100,000 entries, made by duly qualified public accountants, is admissible where the books themselves are in evidence as exhibits. If it does not appear, however, that the objecting party made any effort to secure the missing books, that he had any desire to examine them, or that they were not actually in the custody of the court, such testimony may pe proper."

That quotation is found in Ohio Jurisprudence, Volume 17 under the topic of evidence, Sections 196 and 197. This exhibit will be accepted, subject to your objection [fol. 118-A] and reservation, and the board will reserve ruling on the admission of Appellant's Exhibit No. 5.

By Mr. Lewis:

Q. Has the company any warehouse in Springfield aside from the branch warehouse?

A. No, sir.

Q. In other words, when a truck is completed by the factory what happens to it?

A. It is turned over either to a drive-away company or turned over to the railroad company in cars.

Q. And the warehouse of the branch is solely for the goods of that branch—the branch here at Columbus?

A. Yes, sir, that is right, it is what is called a motor truck sub-branch.

Q. Does the Springfield Works have any salesmen it sends out to solicit orders?

A. No, sir.

Q. What happens if you should get an order, if an order should come in to the Springfield Works, what do you do with it?

A. We would accept no orders other than branch houses or through our Chicago office.

Q. If you got an order from a dealer what would you do with it?

A. We would first determine in what branch that was located and return it to that branch.

Mr. Lewis: May it please the board, I should like to have this paper marked for identification as Appellant's Exhibit No. 6.

Chairman Ford: Very well.

And thereupon the document above referred to was marked for purposes of identification herein as Appellant's Exhibit No. 6.

By Mr. Lewis:

Q. I will hand you this paper marked for purposes of [fol. 119] identification as Appellant's Exhibit No. 6, and I will ask you to tell the court what that is (handing paper to witness).

A. This represents the cost of the trucks and collateral parts produced at the Springfield Works for the years 1934 to 1939 inclusive, and it likewise shows the cost of producing coiled springs at what is known as our Springfield Wire & Spring Company for the same years.

Q. For the years 1934 to 1939 inclusive?

A. Yes, sir.

Q. The first column shows the labor at the Springfield Works?

A. Labor at the Springfield Works, including the so-called labor and burden.

Q. And the second column shows the parts received from other International Harvester Company works?

A. Yes, sir.

Q. And the third column shows the parts and materials purchased from outside sources?

A. Yes, sir.

Q. And the fourth column shows the total cost of production?

A. Yes, sir.

Q. And at the bottom it shows the cost of production for springs at the Springfield Spring Works from 1934 to 1939?

A. The first column shows the same as the (a) under the "works" and it shows the direct labor and the labor and burden.

Q. And the next column?

A. The cost of materials, the third being the sum of the two.

Q. The cost of purchased material?

A. Yes, sir.

Q. Is this compilation taken from the records of the company?

A. Yes, sir.

Q. And you believe that to be correct, do you?

A. Yes, sir.

[fol. 119-A] Mr. Lewis: We offer Appellant's Exhibit No. 6 in evidence.

Mr. Graham: We object. That question has been passed upon by the Supreme Court in the Aluminum Company case in the sixth branch of the syllabus. The court there states: "In computing the numerator of the 'business done' fraction under Section 5498, General Code, the tax commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside of the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio."

This is seeking to do directly what the Supreme Court said he wasn't required to do.

Chairman Ford: I don't believe this is competent or material. The order of the board will be that we will sustain the objection to this exhibit as evidence, but it may be put in the record as a proffer.

Mr. Lewis: May I have an exception to that?

Chairman Ford: Yes, you may.

Mr. Lewis: I have nothing more except a stipulation which we agreed upon before this session began. It is stipulated by the parties, subject to the objection of the appellee as to its relevancy and materiality, that in 1934 and 1935 all motor trucks sold by International Harvester Company to International Harvester Company of America in the Springfield Works were sold delivered f. o. b. factory, and they were delivered either by rail [fol. 120] shipment or drive-away common carrier shipment, and in the bills of lading the consignor was the International Harvester Company and the consignee was the International Harvester Company of America.

Mr. Graham: That is correct, subject to my objection as to relevancy.

Chairman Ford: Mr. Vierling, you are a manufacturing company accountant?

The Witness: That is correct.

Chairman Ford: When a truck, whether in the year 1934 or any subsequent year up to and including the year 1939, a finished truck, left your plant, was there, as between the factory, your plant and the company, any record of the sales value of that truck as it went out of your plant?

The Witness: There was not. The plant issues what is known as a property invoice, each truck by the name or by models or by the wheelbase, the cab or body equipment, it gave a code number to it and we render our property invoice to the branch house only by a code number and description. No dollars or cents are shown on the invoice. We are not interested in dollars and cents in the plant. We have nothing to do with dollars and cents in the plant.

Chairman Ford: Suppose a branch manager in Mankato, Minnesota, sent in an order to the Springfield Works for one truck or half a dozen trucks and those trucks were shipped either to the branch manager or to some dealer pursuant to his direction, what in the way of an invoice would you have to send out with these trucks? [fol. 120-A] The Witness: Repeating again the same tes-

timony, we issue a property invoice to the branch house under whose jurisdiction that dealer was. The plant issues no property invoices to other than branch houses. Neither do we accept shipping orders from other than branch houses.

Chairman Ford: What was on your invoices?

The Witness: By way of explanation, the branch houses send to us what is called a shipping order. It calls for one truck or half a dozen trucks, showing the model, the wheelbase, the color of the paint, the type of wheel equipment, whether single or dual rear, kind and size of tires, if it takes a cab and an open up body or a cab and a dump body, and that is our shipping order from the branch house to our assembly line. If that order shows delivery direct to the branch house, after the truck is completed we turn it over either to a drive-away company or the railroad company for shipment direct to the branch.

If that shipping order shows a delivery to a dealer, we send it to the dealer, but render the invoice, the property invoice, to the branch house.

Chairman Ford: Is there anything on that invoice that you render to the branch manager which shows how much that truck sells for?

The Witness: No, sir. The invoice is a property invoice. It shows the number of the units shipped. We might ship one truck by a certain code, say Code K-1 chassis, with a certain wheelbase, and it could have another code number which would call for a pickup, but [fol. 121] there is no dollar and cents transaction between the manufacturing plant and the branch house. That is taken care of by the general sales department. We issue these property invoices in four copies, to the branch house, one copy to the Chicago office and two copies for works use, but again no dollar and cent invoice is shown. It is just a description in order for the Chicago office to have the proper record.

Chairman Ford: You may or may not know the answer to this question. Who in the first instance fixes the price at which that truck you are talking about should sell for?

The Witness: If you were to come to a dealer as an individual to buy a truck and the dealer would have the company's published list price of anything he might desire and the type of the truck, the kind of equipment I have

just mentioned, the salesman would know what the total cost was to the individual for the truck.

Chairman Ford: But who fixes it in the first place?

The Witness: The Chicago sales department. The Chicago office establishes the sales price of motor trucks.

By Mr. Lewis:

Q. What parts for a Springfield motor truck do you make in the Springfield Works and what parts are either purchased from outside suppliers or are parts received from the other works of the Harvester Company?

Mr. Graham: I object.

Chairman Ford: Following our ruling, we will sustain the objection. If you want to make a proffer of what you expect the witness to say, you can put that in.

[fol. 122] Mr. Lewis: We offer to prove that the Springfield Works manufactures engine shield, radiator front, mud shields, running board and running board shields, cab parts, panel body fronts, rear door panels and numerous small standings, pickup body, side, front and rear panel, and numerous small parts, some of the rear fenders, and at times a small portion of the front fender requirements, and that the balance of parts and materials going into the Springfield trucks are either purchased or received from the other plants of International Harvester Company or purchased from outside suppliers.

That is all we have. We rest.

Mr. Graham: We rely upon the record and what has been introduced on cross examination.

And thereupon the appellant rested.

And thereupon the appellee rested.

And the foregoing was all of the evidence offered, introduced and admitted on behalf of the appellant and on behalf of the appellee on this hearing of this cause.

[fol. 122-A] APPELLANT'S EXHIBIT 2.

International Harvester Company.
Branches and Selling Locations in United States in the Years 1936-1939 Inclusive.

Admitted to do business in all states except Nevada.

Branch Houses located in:

Alabama	Maryland	Oregon
Arkansas	Massachusetts	Pennsylvania
California	Michigan	South Dakota
Colorado	Minnesota	Tennessee
Florida	Missouri	Texas
Georgia	Montana	Utah
Illinois	Nebraska	Virginia
Indiana	New York	Washington
Iowa	North Carolina	West Virginia
Kansas	North Dakota	Wisconsin
Kentucky	Ohio	Wyoming
Louisiana	Oklahoma	(35 states)

In the following states and the District of Columbia where there were no branch houses, there were McCormick-Deering retail stores or motor truck sub-stations:

Connecticut	New Jersey
Delaware	Rhode Island
Maine	Vermont
Mississippi (since Apr. 1938)	District of Columbia
Idaho	(8 states and District of Columbia)

No Selling locations in:

Arizona	New Mexico
Nevada	South Carolina
New Hampshire	(5 states)

[fol. 123] APPELLANT'S EXHIBIT 5.

Shipments of Motor Truck Chassis

from

International Harvester Company,
Springfield Works, Springfield, Ohio,
for Period
November 1, 1938 to October 31, 1939.

Month	Year	Shipped to Dealers and Customers	Shipped to Branch Warehouses of International Harvester Company	Total
November	1938	990	1925	2915
December	1938	1678	2370	4048
January	1939	1895	2817	4712
February	1939	1827	3036	4863
March	1939	2450	4429	6879
April	1939	1594	3824	5418
May	1939	1622	3552	5174
June	1939	1947	3120	5067
July	1939	1751	2332	4083
August	1939	2425	2671	5096
September	1939	1603	2458	4061
October	1939	1528	2672	4200
Totals		21310	35206	56516
		37.7%	62.3%	100%

[fol. 123-A] APPELLANT'S EXHIBIT 6.

International Harvester Company.

Analysis of Springfield Works.

Total Cost of Production—Years 1934 to 1939 Inclusive.

		Springfield Labor (a)	Parts Received from other I. H. Co. Works (b)	Parts and Materials Purchased from Outside Sources (c)	Total Cost of Production (d)
1934	Amount	$2,797,926.45	$5,579,364.30	$8,703,315.01	$17,080,605.76
	Percent	16.38	32.67	50.95	100.00
1935	Amount	4,721,281.98	6,621,173.61	16,817,668.48	28,160,124.07
	Percent	16.77	23.51	59.72	100.00
1936	Amount	5,976,392.42	9,941,726.25	21,576,016.46	37,494,135.13
	Percent	15.94	26.52	57.54	100.00
1937	Amount	8,195,823.48	13,919,402.18	25,825,235.03	47,940,460.69
	Percent	17.10	29.03	53.87	100.00
1938	Amount	5,305,733.46	8,861,061.43	20,460,317.70	34,627,112.59
	Percent	15.32	25.59	59.09	100.00
1939	Amount	4,392,632.29	11,931,667.33	21,510,949.24	37,835,248.86
	Percent	11.61	31.54	56.85	100.00

[fol. 124] (The above figures do not include the Springfield Works.)

(a) Springfield Labor. This consists of Springfield Works productive labor and burden labor.

(b) Interworks Receipts. This is interworks collateral parts and assemblies and also truck engines received from other International Harvester Company works, all of which are located outside of the state of Ohio.

(c) Outside Purchases. This is the balance of the cost of production. It includes raw materials such as sheet steel, on which Springfield Works performs fabricating operations, as well as finished purchased units which Springfield Works merely assembles into complete chassis. Breakdown as to purchases within and without the state of Ohio is not available.

The cost of production for springs at the Springfield Spring Works in the years 1934 to 1939 was as follows:

	Springfield Spring Works Labor	Cost of Purchased Material	Total
1934	$116,417.41	$105,055.14	$221,472.55
1935	201,502.57	196,737.72	398,240.29
1936	296,406.33	282,389.03	578,795.36
1937	426,563.02	417,882.88	844,445.90
1938	265,783.14	265,347.19	531,130.33
1939	187,333.21	217,120.90	404,454.11

[fol. 124-A] BEFORE BOARD OF TAX APPEALS OF OHIO

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto that the statements hereinafter set forth may be considered as true and proven if relevant and material, the same as though proven by competent evidence, reserving, however, to each party the right to object to any stipulation herein contained on the grounds of relevancy and competency and also reserving to each party the right to introduce such further competent evidence as it may deem desirable.

1. International Harvester Company in and during the years 1934 to 1939, both inclusive, was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof, and the sale of such products so manufactured. During the years 1934 to 1939 inclusive it operated several factories in Chicago, Illinois, as well as factories in Auburn, New York; Milwaukee, Wisconsin; Chattanooga, Tennessee; Canton, Rock Falls, Rock Island and East Moline, Illinois; New Orleans, Louisiana; two factories in Springfield, Ohio; Fort Wayne and Richmond, Indiana; and (for part of said period) a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (for part of said period).

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

[fol. 125] 2. (a) During the years 1934 and 1935 all the goods manufactured or handled by the International Harvester Company which were sold to the public in the United States were distributed by International Harvester Company of America, which purchased the goods from the International Harvester Company. During the years 1936 to 1939 inclusive, however, the International Harvester Company operated directly the selling branches in the United States formerly operated by International Harvester Company of America (except in Wisconsin), and sold to dealers and users in the United States, except in Wisconsin, the goods which it manufactured and handled.

International Harvester Company of America continued to handle the Wisconsin business. During the entire period 1934 to 1939 inclusive, International Harvester Company sold its goods to the International Harvester Export Company which sold said goods for the foreign trade to foreign subsidiaries of the International Harvester Company and to jobbers in foreign countries, and to the International Harvester Company of Canada Limited which sold the goods to the public in the Dominion of Canada. International Harvester Company in 1934 and 1935, as well as in the years 1936 to 1939 inclusive, sold a small amount of works collaterals and repair parts direct to the public.

(b) All the capital stock of said International Harvester Company of America, International Harvester Export Company and International Harvester Company of Canada Limited was owned, directly or indirectly, by the International Harvester Company.

[fol. 125-A] (c) International Harvester Company of America had in 1934 and 1935, and International Harvester Company had in the years 1936 to 1939 inclusive more than 100 selling branches in the United States, selling agricultural implements and machines, tractors, motor trucks and kindred lines and repairs thereof and binder twine to dealers and users; also a number of retail stores known as McCormick-Deering Stores, selling at retail to the public; and also a number of retail motor truck sub-stations selling motor trucks at retail to the public, and occasionally selling, at wholesale, motor trucks to dealers. These McCormick-Deering Stores and motor truck sub-stations were each of them under the supervision of the branch house in whose territory it was located.

(d) The branches of the International Harvester Company of America in the state of Ohio in 1934 and 1935, and of said International Harvester Company in 1936 to 1939 inclusive were located at Columbus, Cincinnati, Toledo and Cleveland. The McCormick-Deering Stores in Ohio of the same companies and in the same periods were located at Greenville, Van Wert, Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Hamilton and Portsmouth. The motor truck sub-stations in the state of Ohio of the same companies in the same period were located at Akron, Springfield and Youngstown.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

[fol. 126] 3. During the years 1934 and 1935 International Harvester Company sold to International Harvester Company of America the requirements of the latter company for its business in the United States, and the goods were shipped f. o. b. the factories of International Harvester Company on orders sent from the branches of International Harvester Company of America.

In 1936 and later years the branches of International Harvester Company sent shipping orders to the factories to ship goods to the various branches for storage in warehouses at the branches until the branches could sell them to or ship the goods direct to the dealers, and in a very small percentage of cases to ship direct to the users.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

4. In the years 1934 to 1939 inclusive the goods sold by International Harvester Company to International Harvester Company of Canada Limited and to International Harvester Export Company were sold pursuant to arrangements made by representatives of the International Harvester Company with representatives of International Harvester Company of Canada Limited and International Harvester Export Company located in Chicago, Illinois.

The goods manufactured at the Springfield Works and sold to said International Harvester Company of Canada Limited and International Harvester Export Company were [fol. 126-A] shipped f. o. b. the factory at Springfield, Ohio, to the International Harvester Company of Canada Limited to sell to the public in the Dominion of Canada, and the goods sold to the International Harvester Export Company were shipped to jobbers in foreign countries and to foreign subsidiaries of said International Harvester Company.

(To which stipulation the tax commissioner objects on the grounds of relevancy and competency.)

5. The factories made a small amount of sales of castings and repair parts on orders taken and approved by the factories. On all other sales of agricultural implements and machines, motor trucks, tractors and kindred

lines to dealers and users, the orders were solicited by representatives of the selling branch in whose territory the buyer was located, or the order was received by mail by the selling branch and was not valid until approved by the selling branch.

Each year the selling branch enters into an annual contract with each dealer by which the dealer makes an initial order of goods and estimates the balance of his requirements of the company's goods for the ensuing year, and from time to time orders said goods from the branch. If any order should be received by a factory from a purchaser, unless it were for castings and repair parts, the order would be transmitted by the factory to the branch in whose territory the purchaser was located.

All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received [fol. 127] as part payment are held at the selling branches and interest and principal collected there.

Except for castings and repair parts above referred to, which are sold direct by the factories, the function of the factory is limited to the manufacture of the goods and then to the shipping of them when manufactured to the selling branches or to foreign subsidiaries, or direct to the purchasers on orders received from the branches in the case of sales in the United States or from the general office in Chicago in the case of sales to foreign subsidiaries or to jobbers in foreign countries.

6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, to the user.

7. The selling branches made no sales of agricultural implements or machines at retail to the public, except a small amount of retail sales in places where the company had no dealer representation. The company's own branches, however, sold repair parts and motor trucks at retail to the public.

8. (a) International Harvester Company had in 1934 to 1939 two factories in Ohio, both located at Springfield, known as the Springfield Works and the Springfield Spring

Works. The Springfield Works produces motor trucks. The Springfield Spring Works manufactured coiled springs for agricultural machines. The springs were shipped to factories of the International Harvester Company in other [fol. 127-A] states for incorporation by those factories in agricultural machines. The Springfield Spring Works was discontinued at the end of 1939.

(b) A considerable part of the material and appliances used in the assembly of motor trucks at the Springfield Works is manufactured by the company outside of Ohio and is shipped to the Springfield Works for assembly into motor trucks. A considerable part is purchased from other suppliers both in Ohio and outside of Ohio, and is shipped to the Springfield Works for assembly. In the years 1934 to 1938 inclusive the Springfield Works had a foundry manufacturing malleable castings, part of which was shipped to the Fort Wayne motor truck plant of the International Harvester Company at Fort Wayne, Indiana, and the rest used in the assembly of motor trucks at Springfield Works. The foundry was discontinued at the end of 1938. The Springfield Works made cabs and fenders and some bodies from sheet metal purchased from mills both inside and outside of Ohio. Motors, frames, axles, transmissions, wheels, rims, tires, tubes, brakes and head lamps were either shipped to the Springfield Works from plants of the company outside of Ohio, or were purchased from other manufacturers within or without Ohio.

9. Delivery of motor trucks from the Springfield factory was made partly by rail shipment from the factory to the branch or to the dealer's town, but chiefly by driveaway by a driveaway company from the factory to the branch or to the dealer, or by driveaway by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, ship- [fol. 128] ment was made from the factory direct to the user, or delivery was made to the user at the factory who drove his own truck away.

(To which stipulation the tax commissioner objects on the grounds of competency and relevancy.)

10. The sales by International Harvester Company to International Harvester Company of America in 1934 and 1935 of Springfield Works' products, shipped or delivered to the Ohio branches of International Harvester Company of America were as follows:

1934	$632,936.36
1935	982,202.80

The sales by the Ohio branches of the International Harvester Company of Springfield Works' products in 1936 to 1939 inclusive were as follows:

1936	$1,708,790.00
1937	1,967,693.00
1938	1,360,454.00
1939	1,858,184.00

11. Below is given a table showing in Column A the total sales by Ohio branches to Ohio buyers; in Column B the sales by Ohio branches to Ohio buyers which were of Ohio manufacture, namely the Springfield Works motor trucks; and in Column C the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio.

[fol. 128-A]

	A Sales by Ohio Branches to Ohio Buyers	B Sales by Ohio Branches to Ohio Buyers of Goods of Ohio manufacture, namely Springfield Works motor trucks	C Sales by Ohio Branches to Ohio Buyers of goods manufactured outside Ohio
1936	$7,951,470.80	$1,708,790.00	$6,242,680.80
1937	10,603,519.82	1,967,693.00	8,635,826.82
1938	7,222,372.72	1,360,454.00	5,861,918.72
1939	7,406,063.83	1,858,184.00	5,547,879.83

12. On its Ohio franchise tax returns for the years 1935 to 1940 inclusive, reporting sales for the year previous in each case, the company reported Ohio business as follows:

Ohio Return	Based on figures of	Total Sales in Ohio per Return
1935	1934	$ 885,459.12*
1936	1935	1,531,876.34*
1937	1936	8,546,996.27
1938	1937	11,654,962.12
1939	1938	7,734,202.57
1940	1939	8,125,736.23

13. It is agreed that the figures set out in the following table show for the years 1934 to 1939 the correct amount of property in the state of Ohio, correct amount of the [fol. 129] total property of the company, and the correct percentage of the company's Ohio property to total property.

Year	Ohio Property	Total Property	Percentage in Ohio
1934	$ 7,367,100	$338,666,107	2.1753%
1935	8,119,415	365,556,800	2.2211
1936	8,679,108	398,978,944	2.1730
1937	15,267,228	427,726,061	3.5694
1938	9,613,593	401,966,829	2.3916
1939	9,775,868	396,515,798	2.4654

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* Shipments at sales prices from Springfield Works to Ohio branches of International Harvester Company of America are included here in the following amounts:

1934	$632,936.36
1935	982,202.80

Note: In 1936 the company changed its annual accounting period from a calendar year to a fiscal year ending October 31. In the above table the years 1934 and 1935 are calendar years. 1936 is a 10-month period—January 1 to October 31. The years 1937, 1938 and 1939 are fiscal years beginning November 1 and ending October 31.

It is also agreed that the total business of the company during this same period was as follows:

1934	$ 97,592,280
1935	133,703,278
1936	216,377,171
1937	303,394,978
1938	222,261,604
1939	213,001,465

It is further agreed that the total net worth of the company which shall be subject to the Ohio allocation percentage is for the years 1934 to 1939 as follows:

1934	$322,067,677
1935	338,224,220
1936	362,058,346
1937	373,603,141
1938	375,822,837
1939	368,784,979

14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the amount of the sales proceeds of all goods manufactured [fol. 129-A] by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio.

15. The total amount of inventories of motor trucks and attachments therefor, valued at cost or market whichever is lower, on hand at the various branch house warehouses of the company located all over the United States at the close of business October 31, 1936, 1937, 1938 and 1939, together with the estimated portion representing the product of the Springfield, Ohio, plant, was as follows:

	Total	Estimated Percentage Springfield	Springfield Product
October 31, 1936	$8,800,965.95	55.455%	$4,880,575.67
October 31, 1937	10,356,383.74	55.03%	5,699,117.97
October 31, 1938	8,166,739.10	58.89%	4,809,392.66
October 31, 1939	9,431,696.90	56.87%	5,363,806.03

16. Rule No. 275, adopted October 13, 1939, by the tax commissioner of the state of Ohio, is as follows:

"Rule No. 275. Business done in and out of Ohio. —Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.

[fol. 130] All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.

In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

The denominator of such business fraction shall in all cases be the total sales wherever made."

Signed this thirtieth day of November, 1943.

Edward R. Lewis,
Attorney for Appellant.
Thomas J. Herbert,
Attorney General,
Attorney for Tax Commissioner.
Perry L. Graham,
Assistant Attorney General.

The parties further stipulate, subject to the reservation by appellee of the right to object to the contents of this stipulation on the ground of its relevancy and materiality, as follows:

1. In 1934 and 1935 the contract between International Harvester Company and International Harvester Company of America, under which said International Harvester Company sold motor trucks and attachments and parts therefor to said International Harvester Company of America, provided that the articles sold under said contract should be delivered by said International Har-

[fols. 131-136] vester Company to said International Harvester Company of America f. o. b. factory.

2. The articles sold under said contract were delivered in one of the following three ways:

(a) By shipment by rail or driveaway common carrier f. o. b. factory to branches of International Harvester Company of America all over the United States, on bills of lading with International Harvester Company as consignor and International Harvester Company of America as consignee.

(b) By shipment by rail or driveaway common carrier direct to dealers of International Harvester Company of America all over the United States, on bills of lading with International Harvester Company as consignor and the dealer in each case as consignee.

(c) By the dealer or his representative calling personally at the factory and taking delivery of his own truck, attachments or parts, and transporting them himself to the dealer's town.

O. K. Edward R. Lewis, Attorney for Appellant.

[fol. 137] BEFORE BOARD OF TAX APPEALS OF OHIO

DECISION—Entered February 14, 1945

This cause and matter came on to be heard and considered by the Board of Tax Appeals upon appeal of the International Harvester Company from a final order by the tax commissioner, which final order denied an application theretofore filed by the appellant for the review and correction of certain additional corporation franchise tax assessments made against it by the tax commissioner under the provisions of Section 5461, General Code, for the tax years 1935, 1936, 1937, 1938 and 1939 in the amounts of $26,978.70, $31,416.71, $27,112.04, $23,787.15 and $25,390.28, respectively, and for the review and correction of an additional corporation franchise tax assessment made against it for the then current year 1940 in the amount of $29,882.66. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, a stipulation and supplemental stipulation of facts, the evidence and arguments and briefs of counsel.

It appears from the record that appellant is a New Jersey corporation with its general business and account-

ing office in Chicago, and during the audit period was engaged in the manufacture of agricultural implements, tractors, motor trucks, binder twine and other similar commodities and parts thereof. It operated factories in several parts of the United States, including two in Springfield, Ohio. In 1934 and 1935 all goods manufactured or handled by appellant which were sold in the [fol. 137-A] United States were distributed by the International Harvester Company of America, which purchased the goods from the appellant f. o. b. factory. Such goods were delivered either by rail or drive away carrier to branches of International Harvester Company of America, by rail or drive away carrier to dealers of International Harvester Company of America, or by its dealers or the representatives transporting the goods from the factory. In the remaining years of the period appellant operated its own selling branches except in Wisconsin, in which state alone International Harvester Company of America continued to operate. During the entire period involved appellant sold its goods for foreign trade to International Harvester Export Company and the goods for Canada trade to International Harvester Company of Canada, Ltd. During said entire period appellant sold a small amount of works collaterals and repair parts direct to the public. All the capital stock of the three above-mentioned companies was owned directly or indirectly by appellant.

In the years 1936 to 1939, inclusive, appellant, in addition to its branches, also had some retail stores selling at retail to the public, and a number of motor truck substations selling motor trucks at retail to the public, and sometimes at wholesale to appellant's dealers, each of which stores and substations was under the supervision of the branch in the territory in which it was located. The Ohio branches were located in Columbus, Cincinnati, Toledo and Cleveland; the stores in Greenville, Van Wert, [fol. 138] Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Massillon and Portsmouth; and the substations in Akron, Springfield and Youngstown.

In the years 1936 to 1939, inclusive, the branches sent orders to the factories to ship goods to them for storage at their warehouses until they could sell them or to ship goods to the dealers, and in a very few cases, to ship direct to the customers.

The goods manufactured at Springfield and sold to the Canada company were shipped to it f. o. b. factory and those sold to the export company were shipped f. o. b. factory to jobbers in foreign countries or to foreign subsidiaries of appellant.

All the proceeds from sales in cash and notes were received by the branches, which collected the principal and interest on the notes. Except for direct sales to customers of castings and repair parts, the function of each factory was limited to the manufacture of goods and the shipment thereof to the branches or direct to dealers or consumers on orders received from the branches or to foreign subsidiaries or jobbers on orders from the general office in Chicago. It was further stipulated between the parties as follows:

"8. (a) International Harvester Company had in 1934 to 1939 two factories in Ohio, both located in Springfield, known as the Springfield Works and the Springfield Spring Works. The Springfield Works produces motor trucks. The Springfield Spring Works manufactured coiled springs for agricultural machines. The springs were shipped to factories of the Inter- [fol. 138-A] national Harvester Company in other states for incorporation by those factories in agricultural machines. The Springfield Spring Works was discontinued at the end of 1939.

(b) A considerable part of the material and appliances used in the assembly of motor trucks at the Springfield Works is manufactured by the company outside of Ohio and is shipped to the Springfield Works for assembly into motor trucks. A considerable part is purchased from other suppliers both in Ohio and outside of Ohio and is shipped to the Springfield Works for assembly. In the years 1934 to 1938 inclusive the Springfield Works had a foundry manufacturing malleable castings, part of which was shipped to the Fort Wayne motor truck plant of the International Harvester Company at Fort Wayne, Indiana, and the rest used in the assembly of motor trucks at Springfield Works. The foundry was discontinued at the end of 1938. The Springfield Works made cabs and fenders and some bodies from sheet metal pur-

chased from mills both inside and outside of Ohio. Motors, frames, axles, transmissions, wheels, rims, tires, tubes, brakes and head lamps were either shipped to the Springfield Works from plants of the company outside Ohio, or were purchased from other manufacturers within or without Ohio.

9. Delivery of motor trucks from the Springfield factory was made partly by rail shipment from the factory to the branch or to the dealer's town, but chiefly by driveaway by a driveaway company from the factory to the branch or to the dealer, or by [fol. 139] driveaway by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory direct to the user, or delivery was made to the user at the factory who drove his own truck away.

(To which stipulation the tax commissioner objects on the grounds of competency and relevancy.)

10. The sales by International Harvester Company to International Harvester Company of America in 1934 and 1935 of Springfield Works' products, shipped or delivered to the Ohio branches of International Harvester Company of America, were as follows:

1934	$632,936.00
1935	982,202.00

The sales by the Ohio branches of the International Harvester Company of Springfield Works' products in 1936 to 1939 inclusive were as follows:

1936	$1,708,790.00
1937	1,967,693.00
1938	1,360,454.00
1939	1,858,184.00

11. Below is given a table showing in Column A the total sales by Ohio branches to Ohio buyers; in Column B the sales by Ohio branches to Ohio buyers which where of Ohio manufacture, namely the Springfield Works motor trucks; and in Column C the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio.

[fol. 139-A]

	A Sales by Ohio Branches to Ohio Buyers	B Sales by Ohio Branches to Ohio Buyers of Goods of Ohio manufacture, namely Springfield Works motor trucks	C Sales by Ohio Branches to Ohio Buyers of goods manufactured outside Ohio
1936	$7,951,470.80	$1,708,790.00	$6,242,680.80
1937	10,603,519.82	1,967,693.00	8,635,836.82
1938	7,222,372.72	1,360,454.00	5,861,918.72
1939	7,406,063.83	1,858,184.00	5,547,879.83

12. On its Ohio franchise tax returns for the years 1935 to 1940 inclusive, reporting sales for the year previous in each case, the company reported Ohio business as follows:

Ohio Return	Based on Figures of	Total Sales in Ohio per Return
1935	1934	$ 885,459.12*
1936	1935	1,531,876.34*
1937	1936	8,546,996.27
1938	1937	11,654,962.12
1939	1938	7,734,202.57
1940	1939	8,125,736.23

13. It is agreed that the figures set out in the following table show for the years 1934 to 1939 the correct amount of property in the state of Ohio, correct amount of the total property of the company, and

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* Shipments at sales prices from Springfield Works to Ohio branches of International Harvester Company of America are included here in the following amounts:

1934	$632,936.36
1935	982,202.80

Note: In 1936 the company changed its annual accounting period from a calendar year to a fiscal year ending October 31. In the above table the years 1934 and 1935 are calendar years. 1936 is a 10-month period —January 1 to October 31. The years 1937, 1938 and 1939 are fiscal years beginning November 1 and ending October 31.

[fol. 140] the correct percentage of the company's Ohio property to total property.

Year	Ohio Property	Total Property	Percentage in Ohio
1934	$7,367,100.00	$338,666,107.00	2.1753
1935	8,119,415.00	365,556,800.00	2.2211
1936	8,670,108.00	398,978,944.00	2.1730
1937	15,267,228.00	427,726,061.00	3.5694
1938	9,613,593.00	401,966,829.00	2.3916
1939	9,775,868.00	396,515,798.00	2.4654

It is also agreed that the total business of the company during this same period was as follows:

1934	$97,592,280
1935	133,703,278
1936	216,377,171
1937	303,394,978
1938	222,261,604
1939	213,001,465

It is further agreed that the total net worth of the company which shall be subject to the Ohio allocation percentage is for the years 1934 to 1939 as follows:

1934	$322,067,677
1935	338,224,220
1936	362,058,346
1937	373,603,141
1938	375,822,837
1939	368,784,979

14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the [fol. 140-A] amount of the sales proceeds of all goods manufactured by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio.

15. The total amount of inventories of motor trucks and attachments therefor, valued at cost or market whichever is lower, on hand at the various branch

house warehouses of the company located all over the United States at the close of business October 31, 1936, 1937, 1938 and 1939, together with the estimated portion representing the product of the Springfield, Ohio plant, was as follows:

	Total	Estimated Percentage Springfield	Springfield Product
Oct. 31, 1936	$8,800,965.95	55.455%	$4,880,575.67
Oct. 31, 1937	10,356,383.74	55.03%	5,699,117.97
Oct. 31, 1938	8,166,739.10	58.89%	4,809,392.66
Oct. 31, 1939	9,431,696.90	56.87%	5,363,806.03"

There is no dispute in any of the years involved as to the value of the issued and outstanding stock of appellant or as to the property fraction to be used for determining the base upon which the franchise fee should be computed, or as to the denominator of the business fraction. Consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved.

[fol. 141] In its annual reports the appellant listed the value of the business done by it in Ohio in the years 1934, 1935, 1936, 1937, 1938 and 1939 as $885,459.00, $1,531,876.00, $8,546,966.00, $11,654,962.00, $7,734,203.00, $8,125,736.00, respectively, whereas, the tax commissioner found the value of such business done in Ohio during said years to be $17,377,675.00, $27,074,872.00, $41,594,703.00, $51,115,516.00, $38,251,716.00 and $43,303,316.00, respectively.

The amount returned by appellant as Ohio business done in each of said years includes only the amount of goods sold which were manufactured in Ohio and delivered to branches, dealers and customers in Ohio. The tax commissioner in determining the value of the business done in Ohio during the years 1934 and 1935, used the value of the sales of all goods to the International Harvester Company of America manufactured in Ohio, wherever said goods were sold and delivered. In determining the value of business done in Ohio during the remaining years, the tax commissioner used the value of the sales of all goods manufactured in Ohio, sold and delivered within and without the state, plus the value of the goods manufactured outside

Ohio and sold to Ohio customers. The value of these sales may be broken down as follows:

	Goods Manufactured and Sold in Ohio	Goods Manufactured Inside and Sold Outside Ohio	Goods Manufactured Outside and Sold in Ohio
1936	$1,708,790	$33,047,707	$6,838,206
1937	1,967,693	39,460,554	9,687,269
1938	1,360,454	30,517,468	6,373,794
1939	1,858,184	35,177,580	6,267,552

[fol. 141-A] All of these figures were taken from the records of the appellant and are not in dispute.

The assessments for the years 1935 and 1936, in which are involved the value of business done in Ohio during the years 1934 and 1935, will be considered first since the manner of the transaction of appellants business during these two years presents a different situation than is presented for the remaining years.

As shown above, during the years 1934 and 1935 all goods manufactured by appellant in Ohio which were sold in the United States, were sold to International Harvester Company of America, a subsidiary, the capital stock of which was wholly owned directly or indirectly by appellant, and were sold and distributed to the public by said subsidiary in the same manner as such goods have been since sold and distributed by the appellant. It is true that a major portion of such goods sold by International Harvester Company of America was sold from warehouses, but said warehouses were owned by International Harvester Company of America and not by the appellant. The fact that the subsidiary company was wholly owned by appellant can make no difference. In the case of The Ohio Match Company v. Evatt, 24 O. O., 91, this board found that the tax commissioner did not err in including in Ohio business the amount of corporation sales made to its subsidiary. The board, following the case of North v. Higbee Company, 131 O. S., 507, held as shown by the first and third branches of the syllabus, as follows:

> "In the absence of fraud or a purpose to effect the same, the separate corporate entities of a parent [fol. 142] and subsidiary corporation will not be disregarded notwithstanding the fact that the subsidiary

corporation is controlled by the parent through its stock ownership, and notwithstanding the further fact that the officers and directors of the parent corporation are likewise officers and directors of the subsidiary corporation.

Where a foreign corporation at its plant in Ohio manufactured matches and other products which were sold through an Ohio corporation, its wholly owned subsidiary, the tax commissioner in determining the taxable valuation of the foreign corporation's issued and outstanding stock represented by the property owned and business done by the corporation in Ohio, and in determining the consequent amount of franchise taxes to be paid by the foreign corporation, did not err in including as Ohio business of the corporation sales made to its subsidiary, and did not err in including as property owned by the foreign corporation in Ohio accounts or notes receivable accruing to the foreign corporation from sales of its products to its subsidiary."

As to the tax assessed for the years 1935 and 1936, Rule No. 275 of the tax commissioner is not involved as none of the sales of goods manufactured in Ohio were sold by the appellant from warehouses outside of the state. The franchise tax for these two years was computed by the tax commissioner according to the amount of goods manufactured in Ohio irrespective of whether such goods [fol. 142-A] were sold within or without the state. The board is bound by the law of the Supreme Court as pronounced in the case of Aluminum Company of America v. Evatt, 140 O. S., 385, which it finds is directly applicable as to said two years. In that case the court held as follows:

"A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state, in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the Fourteenth Amendment thereto.

(American Mfg. Co. v. City of St. Louis, 250 U. S., 459 followed.)"

It is, therefore, considered and adjudged that the action of the tax commissioner in making the assessments complained of for the years 1935 and 1936 be, and the same hereby, is affirmed.

During the years 1936 to 1939, inclusive, appellant operated its own branches except in Wisconsin, in the same manner in which they had been operated by the International Harvester Company of America. In other words, outside of a small amount of castings and repair parts sold by the factories, on all sales of agricultural implements and machines, motor trucks, tractors and kindred lines to dealers and users in the United States, the orders were [fol. 143] solicited by agents of the branches, or the orders were received by mail by the branches, and in case any orders were received by the factories they would be transmitted to the proper branches. All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users.

It is claimed by the appellant that the sales of goods manufactured out of Ohio and sold to Ohio customers should not be included in the numerator of the business fraction.

All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Company of America v. Kentucky, 234 U. S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were

concerned, it was engaged solely in interstate commerce and was, therefore, not subject to the jurisdiction of the [fol. 143-A] state. The court held, however, that the continuous solicitation of orders through local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Company v. Department of Treasury, 322 U.S., 340, 88 L. Ed., 905. The board further finds that the tax commissioner's Rule No. 275, which the board has heretofore held valid, is applicable to sales of goods from its warehouses in Ohio. The pertinent portion of this rule reads as follows:

> "All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales."

There is some contention that this rule cannot apply to the assessments which were for the years prior to its effective date. However, the same situation existed in the case of Aluminum Company of America v. Evatt, supra, and the rule was held applicable. In each case the assessments were for years prior to the effective date of the rule, but were not actually made until after such date. Appellant practically concedes the taxability of these sales in its brief by the following language:

> "We submit that for the sales to be Ohio sales probably all, but certainly at least one, of the following three conditions should be met:
>
> (1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale. [fol. 144] (2) The orders or contracts must be accepted in Ohio.
>
> (3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.
>
> • • • • • • •
>
> All of these conditions are present in sales made by the Ohio branches."

Under Section 5498, General Code, the numerator of the business fraction is the value of the business done in

this state. The tax commissioner has included in this value the amount of such sales, and since the sales in question constituted doing business in Ohio, the board finds that the action of the tax commissioner in including in the numerator of the business fraction the value of all sales of goods manufactured outside of Ohio to customers in Ohio was proper, and the same hereby is affirmed.

As the stipulation and the evidence show, a considerable portion of the sales to customers outside Ohio of goods manufactured in Ohio, were made during the years 1936 to 1939, inclusive, from warehouses outside Ohio. The board finds that Rule No. 275 of the tax commissioner is applicable to such sales from warehouses outside of Ohio of all goods manufactured in the state. The pertinent portion of this rule reads as follows:

> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

[fol. 144-A] The difficulty lies here in determining the portion of the total sales of goods manufactured and shipped out of the state which were sold from warehouses. From a reading of the testimony it is probable that a major portion of the goods sold by the branches to dealers was sold from stock on hand at the branches. Of course, the main purpose of maintaining warehouses is to provide for the filling of orders received by branches from stock on hand rather than having each order shipped from factories located in various parts of the country, and thus facilitate deliveries. It is conceded that a very small percentage of goods sold by branches was shipped direct to consumers. From the record in this case it certainly cannot be said that none of the goods manufactured in Ohio and sold to customers outside the state was sold from warehouses.

The assessments in question cover the activities of the appellant as far back as 1934, and at the time of the hearing no records were in existence by which the amount of trucks manufactured in Ohio and delivered to branches outside of Ohio could be determined except for the year 1939. The property invoices issued by the Springfield Works to the branch houses during the year 1939 were in

existence, which show whether the goods included therein were shipped to dealers, customers or branch houses. For the purpose of determining what percentage of goods manufactured at Springfield was delivered to appellant's branches and what percentage was delivered to dealers and consumers, the auditor at Springfield caused to be examined all the property invoices issued during that year and [fol. 145] made a compilation thereof. This work involved the examination of approximately fifty-eight thousand invoices. According to the testimony, these invoices are the only records available upon which such a determination can be made. This compilation shows that in the year 1939 62.3% of the goods manufactured in Ohio was delivered to the branch houses and 37.7% was delivered directly to dealers or consumers. The stipulation also shows that the inventories of goods manufactured in Ohio and on hand in warehouses at the close of the fiscal years 1936 to 1939, inclusive, ranged from $4,809,392.66 to $5,699,117.97, and that the portion of all goods on hand representing Ohio products in each of said years remained substantially uniform. The natural conclusion from this is that the situation which existed in 1939 remained approximately the same during the preceding years, namely, that approximately 62% of the goods sold which were manufactured in Ohio was delivered to branch warehouses. Since these are the only records in existence, the board finds that these records are the only basis upon which an estimate can be made with any degree of certainty of the portion of goods manufactured in Ohio, which was sold from warehouses.

However, objection has been made to the admissibility of the auditor's compilation for the year 1939, which was offered in evidence as Appellant's Exhibit No. 5, as being immaterial; but the serious question is as to its competency since the best evidence would be the original invoices, which, because of their volume, were not presented at the hearing. The general rule is stated in 17 O. J., 197 and 198 (Section 175), as follows:

[fol. 145-A] "In the absence of some special reason, the testimony of private auditors and of accountants is inadmissible to show the contents of original accounts or books. Such evidence may, of course, be the best evidence which can be produced of lost or destroyed books and accounts, and admissible as such. And the

general rule is that in the sound discretion of the court, where books and documents of account are numerous and voluminous, the testimony of a competent expert accountant as to the result of his examination of the books is admissible, though in such case the books and documents must either be first offered in evidence, or be in the custody of the court so that the opposite party may have the opportunity, by examining the originals, to verify the correctness of the abstracts and schedules thereof, offered against him."

This section also states:

"If it does not appear, however, that the objecting party made any effort to secure missing books, that he had any desire to examine them, or that they were not actually in the custody of the court, such testimony may be proper."

Wigmore on Evidence, Third Edition, Section 1230, reads as follows:

"Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements—as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger—it is [fol. 146] obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper."

Jones on Evidence, Third Edition, states in Section 206:

"Where the originals consist of numerous documents which cannot be conveniently examined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and who is skilled in such matters, provided the result is capable of being ascertained by calculation."

There has been no desire expressed for an opportunity to examine the original invoices, and it appears that most of the figures used by the tax commissioner were furnished to him by the appellant and were received by him without question. The board is of the view that under the circumstances in this case the testimony of the auditor on this matter and Exhibit 5 should be admitted in evidence, and the objection of the appellee is, therefore, overruled. Mathe- [fol. 146-A] matical exactitude cannot always be attained, but, as stated in Illinois Central Railroad Company v. Minnesota, 309 U. S., 157, 84 L. Ed., 670, "rough approximation rather than precision is the norm in a tax system."

From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified.

It is contended that the tax assessments in question violate the due process and commerce clauses of the United States Constitution. The full and careful consideration by the Supreme Court of Ohio of the questions raised in Aluminum Company of America v. Evatt, supra, so completely answers the claims of the appellant in this case that it is unnecessary to discuss the cases cited by appellant, some of which were considered in the opinion in that case.

The board is of the opinion that the tax as herein modified is properly apportioned to the business done and property owned within the state and, therefore, violates none of the rights of the appellant guaranteed by the federal Constitution. It is claimed that the assessment in question results in double or multiple taxation. However, such taxa- [fol. 147] tion of itself is not constitutionally objectionable. Fidelity & Columbia Trust Company v. City of Louisville, 245 U. S., 54, 62 L. Ed. 145; Cream of Wheat Company v. County of Grand Fork, 253 U. S., 325, 64 L. Ed., 931. In

Tax Commission v. Aldrich, 316 U. S., 174, 86 L. Ed., 1358, the court said:

> "It is not the province of the courts to provide a system to protect against multiple taxation."

Where the activities of a company are extensive in territory and complex, as in this case, it is possible that the same subject may be taxed by more than one state. It is not to be assumed that taxes levied by other states are lawful and those levied by this state are improperly imposed. It is only where the tax necessarily results in a direct and unjust discrimination against interstate commerce and is imposed with the purpose or effect of defeating constitutional rights that such a tax is invalid, and where the tax is proportioned to the business done or property owned within the state it is valid even though double taxation may incidentally result.

The following is stated in Hump Hairpin Manufacturing Company v. Emmerson, 258 U. S., 290, 66 L. Ed., 622:

> "While a state may not use its taxing power to regulate or burden interstate commerce, a state excise tax which affects such commerce not directly, but only incidentally and remotely, may be entirely valid, where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

[fol. 147-A] And in International Shoe Company v. Shartel, 279 U. S., 429, 73 L. Ed., 781, the third and fourth headnotes read as follows:

> "The mere fact that a corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business.
>
> A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce."

In Coverdale v. Arkansas-Louisiana Pipe Line Company, 303 U. S., 604, 82 L. Ed., 1043, the third and fifth headnotes read as follows:

"The exemption of those engaged in interstate commerce from nondiscriminatory taxes should not be extended beyond the necessity of keeping that commerce free from interference.

The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce."

In Illinois Central Railroad Company v. Minnesota, supra, the following is held:

"The Fourteenth Amendment does not forbid double taxation, short of confiscation or proceedings unconstitutional on other grounds.

[fol. 148] A state property tax on railroads owning or operating lines within the state, based on the gross earnings derived from operations within the state, does not violate the commerce clause of the federal Constitution, where such tax has a fair relation to the property employed in the state."

The following rule is laid down in General Trading Company v. State Tax Commission, 88 L. Ed., 914:

"While no state can tax the privilege of doing interstate business, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce, does not exempt it from state taxation, so long as such taxation is not obviously hostile or practically discriminatory toward such commerce."

In International Harvester Company v. Department of Treasury, 88 L. Ed., 905, the court held with reference to a gross income tax:

"Neither the commerce clause nor the due process clause of the Fourteenth Amendment preclude a state from levying a gross income tax in respect to the proceeds of sales by foreign corporations authorized to

do business in the state by branches located outside the state to purchasers residing in the state who took deliveries at factories within the state, by branches located in the state to purchasers residing outside of but coming into the state to take delivery, and by branches within the state to customers residing in the state, of [fol. 148-A] goods shipped to such customers from points outside the state, pursuant to contracts so providing."

It is considered and adjudged by the board that the action of the tax commissioner in making the assessment complained of be, and hereby is, modified in the respect herein above set forth, and that as modified the same be, and hereby is, affirmed. And the tax commissioner is directed to correct his assessment certificate in accordance with this entry.

[Duly certified.]

BEFORE BOARD OF TAX APPEALS OF OHIO

APPELLANT'S PETITION FOR REHEARING—

Filed March 3, 1945.

International Harvester Company, appellant in the foregoing cause, respectfully petitions for a rehearing in the matter of the decision of the Board of Tax Appeals, Department of Taxation of Ohio, entered in the above-entitled cause February 14, 1945, on the grounds set out below.

(1) The decision of the Board of Tax Appeals in this cause, as set out in its "Entry", is erroneous in stating that appellant practically concedes the taxability of sales by branches outside of Ohio when the trucks were shipped direct from Springfield Works to the buyers in other states.

On page 8 of the "entry" of the Board of Tax Appeals in this cause it is stated that:

"Appellant practically concedes the taxability of these sales in its brief by the following language: [fol. 149] 'We submit that for the sales to be Ohio sales probably all, but certainly at least one of the following three conditions should be met:

'(1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale.

'(2) The orders or contracts must be accepted in Ohio.

'(3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.

• • • • • • • • • •

'All of these conditions are present in sales made by the Ohio branches.' "

We respectfully submit that the board has misunderstood the argument in appellant's brief. The above language appears at the bottom of page 10 of appellant's brief and continues to the end of the first paragraph on page 11. There is one sentence omitted in the opinion of the board which is vital to the understanding of the appellant's point. We quote below the argument in full, given by the appellant.

"In the additional assessments involved in this appeal, the tax commissioner has used total sales of the company in the denominator of the fraction as total business done. Accordingly, it follows that in the numerator of the fraction Ohio business should be Ohio sales. We submit that for the sales to be Ohio sales probably all, but certainly at least one, of the following three conditions should be met:

[fol. 149-A] (1) Salesmen must be sent out from the Ohio office of the taxpayer to solicit orders or contracts of sale.

(2) The orders or contracts must be accepted in Ohio.

(3) The proceeds of the sales must be remitted to the branches in Ohio making the sales.

None of these conditions is present in the case of shipments by the Springfield Works to buyers in other states where the sales were negotiated by branches located in other states. All of these conditions are present in sales made by the Ohio branches."

It will be noticed that the sentence "None of these conditions is present in the case of shipments by the Spring-

field Works to buyers in other states where the sales were negotiated by branches located in other states" is omitted on page 8 of the board's opinion.

Therefore, appellant did not in any manner concede the taxability of these sales by the above language. The above language means that all these conditions were present in sales made by Ohio branches, namely the branches at Cincinnati, Cleveland, Toledo and Columbus. These sales were all included in Ohio business in the original franchise tax returns filed by appellant.

We did wholly concede that those sales were Ohio sales. But we said in the language quoted above that none of the three elements above specified was present when sales of Springfield trucks were made by branches outside of Ohio. [fol. 150] The branches outside Ohio sold the goods, accepted the orders and received the sales proceeds.

This is so crucial a misunderstanding that we believe a rehearing is warranted for this reason alone.

When the trucks were sold by branches outside of Ohio, the whole sale from beginning to end was handled by the branch outside of Ohio, the order solicited by it, the order or contract was accepted by it, the sales proceeds were received by it, and the trucks were not sold from any warehouse in Ohio. The factory at Springfield is a factory only and it has no warehouse. The factory at Springfield is in no sense a selling branch, and the evidence showed that it did not even know the sales proceeds of a truck shipped by it. In the case of the sale of a truck by a branch outside of Ohio, when the truck was shipped from Springfield Works direct to the dealer in another state, the truck cannot be considered as sold from a warehouse in Ohio.

(2) In its decision the Board of Tax Appeals has given no consideration to the point made in appellant's brief on page 39 that the fiscal period ended October 31, 1936, was only a 10 months' period, and that the tax for that 10 months' period should be reduced to five-sixths of the annual tax.

The fiscal year ended October 31, 1936, was only a 10 months' period (S. 9). At the end of 1935 International Harvester Company changed from a calendar year to a fiscal year basis ending on October 31. Accordingly, its last return to the state of Ohio and other states and for federal income tax purposes on the calendar year

[fol. 150-A] basis was the calendar year 1935. Obviously, International Harvester Company was taxed for the full year 1935 on a calendar year basis. It has also been taxed for the full year beginning November 1, 1936 and ending October 31, 1937 on a 12 months' basis. If then for the fiscal period beginning January 1, 1936 and ending October 31, 1936 the tax is computed on a 12 months' basis, the company is being taxed twice for the last two months of 1936. It is obvious, therefore, that the tax for the fiscal period of 10 months ending October 31, 1936 should be reduced to five-sixths of the annual tax.

We submit that the taxpayer is entitled to a rehearing also on this point that the tax for the 10 months' period ending October 31, 1936 should be reduced to five-sixths of the annual tax.

(3) The Board of Tax Appeals in its decision as set out in its "entry" makes no provision for deduction of the amount of goods sold by branches of the company in Ohio, when the goods were shipped direct from factories or transfer warehouses of the company outside of Ohio to buyers in Ohio.

Under the decision of the board in this case, as set out in its "Entry", there will be excluded all sales of trucks made by branches outside of Ohio where the trucks were delivered off the branch house floors of those branches. But under the opinion, there will be still included in Ohio business all sales of trucks manufactured at the Springfield Works where the trucks were sold by branches outside of Ohio and the trucks were shipped direct by the Springfield Works to the buyers outside of Ohio.

[fol. 151] Also under the decision there will still be included in Ohio business all sales of goods by Ohio branches to Ohio buyers where the goods were shipped direct from factories or transfer warehouses of the taxpayer outside of Ohio to buyers in Ohio.

On this point, of course, we are in no way conceding the validity of the inclusion of sales by branches outside of Ohio where the goods were shipped direct from the Springfield Works to buyers in other states. We are limiting ourselves on this point merely to pointing out the inconsistency of including as Ohio business sales by branches outside of Ohio of goods manufactured in Ohio, which were shipped to buyers in other states, and yet at the same time

including in Ohio business sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio, which were shipped direct from points outside Ohio to the buyers in Ohio. There is no possible way of justifying the inclusion of both these classes of sales.

We submit that if it should be held that sales by branches outside Ohio to buyers in other states, where the goods were shipped direct from the Springfield Works to the buyers in other states, should be included in Ohio business, then obviously there should be excluded from Ohio business sales by Ohio branches to Ohio buyers where the goods were shipped either from factories or transfer warehouses outside Ohio to the buyers in Ohio.

The record in this case shows that 38% of the Springfield trucks were shipped from the factory direct to the [fol. 151-A] buyers. It is a fair conclusion that a large proportion of other goods were shipped by the factories and warehouses outside Ohio direct to the buyers in Ohio.

We submit that the failure in the board's decision to provide for the exclusion of sales by Ohio branches, where the goods were shipped direct from factories or transfer warehouses outside of Ohio to the buyers in Ohio, while at the same time holding that there must be included sales by branches outside of Ohio where the goods were shipped from the Springfield Works direct to the buyers outside of Ohio, is a further ground entitling the appellant to a rehearing.

Respectfully submitted this second day of March, 1945.

Edward R. Lewis, Attorney for Appellant, International Harvester Company.

BEFORE BOARD OF TAX APPEALS OF OHIO

ORDER DENYING PETITION FOR REHEARING—

Entered March 12, 1945

This cause came on to be considered upon the petition of the appellant for a rehearing in the matter of the decision heretofore entered herein on February 14, 1945. On consideration thereof the board finds said petition not well taken, and it is therefore considered and adjudged by the

board that said petition for a rehearing be, and the same hereby is, denied.

[Duly certified.]

[fol. 152] APPELLEE'S EXHIBIT "G"—July 3, 1941

Department of Taxation
Division of Franchise Tax
State of Ohio
Columbus, Ohio

Attention: Mr. J. W. Foley, Examiner

Gentlemen:

Complying with your verbal request in conference in your offices in Columbus on May 21, 1941, we enclose herewith the following Exhibits and supporting Schedules:

1. Exhibit A, together with Schedules 1 to 5, statements showing the separation of the International Harvester Company's sales of motor trucks, attachments and parts therefor between Springfield, Ohio product, Fort Wayne, Indiana product and other product for the years 1934 to 1939, inclusive.

2. Exhibit B, statement showing sales of Springfield product by the Company's selling branches located in Ohio for the years 1936 to 1939.

3. Exhibit C, statement showing sales of works collateral parts made by the Springfield, Ohio plants in the years 1934 and 1935.

It is our understanding that you desire this information in order that you may revise the computation of proposed taxes submitted with your letter of March 25, 1941. The original sales computation, as you remember, was prepared on a unit basis. In other words you divided total proceeds from sales of the motor truck line by the total number of units sold and multiplied the average proceeds per unit thus obtained by the number of Springfield units sold. This resulted in assigning to Springfield product an amount of proceeds which was entirely too great because of the fact that the heavy duty or higher priced trucks were all produced at the Fort Wayne, Indiana plant, while the lower priced models were produced at Springfield.

We do not concede that the total sales of Springfield Product constitute Ohio business; but are submitting this information merely to comply with your request.

You will find that generally the figures in the attached exhibits and schedules are self explanatory. In some cases we were obliged to use percentages in order to arrive at our results.

[fol. 153] In making your revision it seems to us that you should add the totals for Springfield by years shown on Exhibit A to the totals for Exhibit C, deduct the totals by years shown on Exhibit B and then pick up the sales for the years 1936 to 1939 as shown in our franchise tax returns. The latter figures include sales of works collaterals for 1936 to 1939 corresponding to those for 1934 and 1935 shown on Exhibit C.

We wish to thank you for your fine cooperation in allowing us ample time in which to compile our figures and we hope they will be satisfactory. In case more information will be required or you have any questions relative to the enclosed statements please let us hear from you.

Yours very truly, International Harvester Company,
C. L. Johns, Auditor of Tax Returns.

B

[fol. 154]

EXHIBIT A

International Harvester Company

Total Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product
Years 1934 to 1939, Inclusive

Summary

Sales of Motor Trucks, Attachments, and Parts	1934 Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
To Dealers and Users	$	$	$	$
To Subsidiaries (Sch. 1):				
I. H. Co. of America	27,994,665.18	14,602,910.59	13,391,754.59	
I. H. Co. of Canada, Ltd.	137,700.00	110,700.00	27,000.00	
I. H. Export Company	5,076,110.59	2,411,541.50	2,664,569.09	
	$33,208,475.77	$17,125,152.09	$16,083,323.68	$
	1935			
To Dealers and Users	$	$	$	$
To Subsidiaries (Sch. 1):				
I. H. Co. of America	42,690,175.80	22,346,152.90	20,344,022.90	
I. H. Co. of Canada, Ltd.	4,200.00		4,200.00	
I. H. Export Company	6,917,466.96	4,179,046.49	2,738,420.47	
	$49,611,842.76	$26,525,199.39	$23,086,643.37	$
	1936			
To Dealers and Users (Sch. 2)	$63,064,606.62	$30,905,079.77	$31,974,406.13	$185,120.72
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,274,965.21	616,010.75	658,954.46	
I. H. Co. of Canada, Ltd.	25,500.00	11,368.28	14,131.72	
I. H. Export Company	6,746,003.67	3,224,038.64	3,521,965.03	
	$71,111,075.50	$34,756,497.44	$36,169,457.34	$185,120.72

EXHIBIT A—Continued

International Harvester Company

Total Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product
Years 1934 to 1939, Inclusive

Summary

Sales of Motor Trucks, Attachments, and Parts	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
1937				
To Dealers and Users (Sch. 3)	$73,152,499.09	$35,885,419.19	$37,098,780.10	$168,299.80
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,896,494.02	942,980.15	953,513.87	.....
I. H. Co. of Canada, Ltd.	103,800.00	46,115.14	57,684.86	.....
I. H. Export Company	9,775,000.00	4,553,732.50	5,221,267.50	.....
	$84,927,793.11	$41,428,246.98	$43,331,246.33	$168,299.80
[fol. 155]				
1938				
To Dealers and Users (Sch. 4)	$54,665,956.87	$27,385,978.00	$27,196,558.16	$83,420.71
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,001,042.33	498,259.28	502,783.05	.....
I. H. Co. of Canada, Ltd.	96,600.00	48,054.24	48,545.76	.....
I. H. Export Co.	7,900,000.00	3,945,630.00	3,954,370.00	.....
	$63,663,599.20	$31,877,921.52	$31,702,256.97	$83,420.71
1939				
To Dealers and Users (Sch. 5)	$67,284,950.21	$32,328,826.09	$34,861,361.83	$94,762.29
To Subsidiaries (Sch. 1):				
I. H. Co. of America	1,631,331.83	821,579.61	809,752.22	.....
I. H. Co. of Canada, Ltd.	57,000.00	26,728.90	30,271.10	.....
I. H. Export Co.	7,985,000.00	3,858,629.50	4,126,370.50	.....
	$76,958,282.04	$37,035,764.10	$39,827,755.65	$94,762.29

[fol. 156]

SCHEDULE 1

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts to Subsidiary Companies Separated Between Springfield and Fort Wayne Product

Sales to Subsidiaries	Total Motor Truck Sales	Springfield Product	Fort Wayne Product
1934			
I. H. Co. of America:			
Motor Trucks and Attachments	$24,093,093.36	$14,602,910.50	$9,490,182.77
Repair parts	3,901,571.82	.....	3,901,571.82
I. H. Co. of Canada, Ltd.:			
Motor Trucks and Attachments	112,700.00	110,700.00	2,000.00
Repair Parts	25,000.00	.....	25,000.00
I. H. Export Company:			
Motor Trucks	3,522,850.65	2,221,913.25	1,300,937.40
Attachments	300,656.25	189,628.25	111,028.00
Repair Parts	1,252,603.69	.....	1,252,603.69
	$33,208,475.77	$17,125,152.09	$16,083,323.68
1935			
I. H. Co. of America:			
Motor Trucks and Attachments	$37,541,497.50	$22,346,152.90	$15,195,344.60
Repair Parts	5,148,678.30	.....	5,148,678.30
I. H. Co. of Canada, Ltd.:			
Motor Trucks and Attachments	3,200.00	.....	3,200.00
Repair Parts	1,000.00	.....	1,000.00
I. H. Export Company:			
Motor Trucks	5,365,092.00	3,936,350.00	1,428,742.00
Attachments	330,785.85	242,696.49	88,089.36
Repair Parts	1,221,589.11	.....	1,221,589.11
	$49,611,842.76	$26,525,199.39	$23,086,643.37

SCHEDULE 1—Continued

[fol. 157]

Sales to Subsidiaries	1936 Proceeds	% Springfield	Springfield Product	Fort Wayne Product
I. H. Co. of America:				
Trucks and Attachments	$1,110,829.95	55.455%	$616,010.75	$494,819.20
Parts	164,135.26		.....	164,135.26
	$1,274,965.21		$616,010.75	$658,954.46
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$20,500.00	55.455%	$11,368.28	$9,131.72
Parts	5,000.00		.....	5,000.00
	$25,500.00		$11,368.28	$14,131.72
I. H. Export Co.:				
Trucks and Attachments	$5,813,792.52	55.455%	$3,224,038.64	$2,589,753.88
Parts	932,211.15		.....	932,211.15
	$6,746,003.67		$3,224,038.64	$3,521,965.03
	1937			
I. H. Co. of America:				
Trucks and Attachments	$1,713,574.69	55.03%	$942,980.15	$770,594.54
Parts	182,919.33		.....	182,919.33
	$1,896,494.02		$942,980.15	$953,513.87
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$83,800.00	55.03%	$46,115.14	$37,684.86
Parts	20,000.00		.....	20,000.00
	$103,800.00		$46,115.14	$57,684.86
I. H. Export Co.:				
Trucks and Attachments	$8,275,000.00	55.03%	$4,553,732.50	$3,721,267.50
Parts	1,500,000.00		.....	1,500,000.00
	$9,775,000.00		$4,553,732.50	$5,221,267.50

[fol. 158]

SCHEDULE 1---Continued

Sales to Subsidiaries	Proceeds	% Springfield	Springfield Product	Fort Wayne Product
1938				
I. H. Co. of America:				
Trucks and Attachments	$864,084.70	58.89%	$498,259.28	$347,825.42
Parts	154,957.63		.....	154,957.63
	$1,001,042.33		$498,259.28	$502,783.05
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$81,600.00	58.89%	$48,054.24	$33,545.76
Parts	15,000.00		.....	15,000.00
	$96,600.00		$48,054.24	$48,545.76
I. H. Export Company:				
Trucks and Attachments	$6,700,000.00	58.89%	$3,945,630.00	$2,754,370.00
Parts	1,200,000.00		.....	1,200,000.00
	$7,900,000.00		$3,945,630.00	$3,954,370.00
1939				
I. H. Co. of America:				
Trucks and Attachments	$1,444,662.59	56.87%	$821,579.61	$623,082.98
Parts	186,669.24		.....	186,669.24
	$1,631,331.83		$821,579.61	$809,752.22
I. H. Co. of Canada, Ltd.:				
Trucks and Attachments	$47,000.00	56.87%	$26,728.90	$20,271.10
Parts	10,000.00		.....	10,000.00
	$57,000.00		$26,728.90	$30,271.10
I. H. Export Company:				
Trucks and Attachments	$6,785,000.00	56.87%	$3,858,629.50	$2,926,370.50
Parts	1,200,000.00		.....	1,200,000.00
	$7,985,000.00		$3,858,629.50	$4,126,370.50

[fol. 159]

SCHEDULE 2

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1936

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
C-1	$9,811,724.50	$9,811,724.50	.....	
C-5	702,259.54	702,259.54	.....	
C-15	843,675.78	843,675.78	.....	
C-10	147,838.80	147,838.80	.....	
C-20	650,108.62	650,108.62	.....	
C-12	51,004.01	51,004.01	.....	
C-30	10,971,017.33	10,971,017.33	.....	
CS-30	1,340,623.05	1,340,623.05	.....	
C-300	55,904.78	55,904.78	.....	
M-2 and M-3	257,926.99	257,926.99	.....	
C-35	5,170,199.48	.....	5,170,199.48	
CS-35	2,603,550.06	.....	2,603,550.06	
C-35-B	39,233.27	.....	39,233.27	
CS-35-B	5,655.14	.....	5,655.14	
C-40	5,241,444.72	.....	5,241,444.72	
CS-40	1,078,048.49	.....	1,078,048.49	
C-50	1,540,475.25	.....	1,540,475.25	
CS-50	21,596.62	.....	21,596.62	
C-55	871,462.29	.....	871,462.29	
C-60	1,788,037.96	.....	1,788,037.96	
A-7	47,072.53	.....	47,072.53	
A-8	167,059.36	.....	167,059.36	
C-35-T	51,339.41	.....	51,339.41	
CS-35-T	141,840.98	.....	141,840.98	
C-40-T	144,674.30	.....	144,674.30	
CS-40-T	96,513.01	.....	96,513.01	
C-40-F	234,277.96	.....	234,277.96	

SCHEDULE 2—Continued

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1936

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product	
C-50-T	83,070.16	.....	83,070.16		
C-50-F	21,132.62	.....	21,132.62		
C-55-T	41,281.84	.....	41,281.84		
C-55-F	403,636.37	.....	403,636.37		
C-60-T	85,778.31	.....	85,778.31		
A-7-F	17,958.59	.....	17,958.59		
A-8-F	50,848.62	.....	50,848.62		
	$44,778,270.74	$24,832,083.40	$19,946,187.34	.....	Spfld. 55.455%
All Others	71,941.78	.....	.....	$71,941.78	
Barter Trucks	113,178.94	.....	.....	113,178.94	
	$44,963,391.46	$24,832,083.40	$19,946,187.34	$185,120.72	
Attachments	10,951,215.16	6,072,996.37	4,878,218.79	.....	Spfld. 55.455%
	$55,914,606.62	$30,905,079.77	$24,824,406.13	$185,120.72	
Parts	7,150,000.00	.....	7,150,000.00	.....	
Totals	$63,064,606.62	$30,905,079.77	$31,974,406.13	$185,120.72	

[fol. 160]

SCHEDULE 3

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1937

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$6,921,372.72	$6,921,372.72	$.....	
D-5	217,036.58	217,036.58	.....	
D-15	2,024,833.56	2,024,833.56	.....	
D-30	8,023,702.63	8,023,702.63	.....	
DS-30	1,032,951.47	1,032,951.47	.....	
D-300	410,569.78	410,569.78	.....	
DS-300	27,305.93	27,305.93	.....	
D-35	4,423,305.04	.....	4,423,305.04	
DS-35	1,374,784.16	.....	1,374,784.16	
D-40	4,347,926.73	.....	4,347,926.73	
D-50	905,576.64	.....	905,576.64	
D-60	180,266.94	.....	180,266.94	
DR-60	446,014.31	.....	446,014.31	
DR-70	154,648.29	.....	154,648.29	
A-8	285,202.29	.....	285,202.29	
D-216-T	15,200.75	.....	15,200.75	
DS-216-T	1,591.81	.....	1,591.81	
D-246-T	40,097.30	.....	40,097.30	
D-246-F	86,941.26	.....	86,941.26	
DR-346-T	34,783.05	.....	34,783.05	
D-346-F	100,868.57	.....	100,868.57	
DR-426-F	5,553.91	.....	5,553.91	
AR-626-F	115,069.36	.....	115,069.36	
C-1	3,276,968.18	3,276,968.18	.....	
C-5	392,586.56	392,586.56	.....	
C-15	946,599.05	946,599.05	.....	
C-10	36,600.57	36,600.57	.....	
C-20	199,096.94	199,096.94	.....	
C-12	57,859.27	57,859.27	.....	
C-30	4,136,008.79	4,136,008.79	.....	
CS-30	726,891.43	726,891.43	.....	
C-300	282,976.40	282,976.40	.....	
CS-300				

CS-300	6,943.01	6,943.01			
M-2	2,140.80	2,140.80			
M-3	211,552.03	211,552.03			
C-35	2,260,528.58		2,260,528.58		
CS-35	1,247,992.15		1,247,992.15		
C-35-B	36,178.15		36,178.15		
CS-35-B	2,826.29		2,826.29		
C-40	3,076,018.94		3,076,018.94		
CS-40	1,064,774.09		1,064,774.09		
C-50	596,788.75		596,788.75		
CS-50	227,995.88		227,995.88		
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C-55	540,118.69		540,118.69		
C-60	1,134,040.74		1,134,040.74		
A-7	10.75*		10.75*		
C-35-T	31,736.88		31,736.88		
CS-35-T	61,889.72		61,889.72		
C-40-T	51,940.90		51,940.90		
CS-40-T	94,767.21		94,767.21		
C-40-F	171,618.27		171,618.27		
C-50-T	33,314.24		33,314.24		
CS-50-T	17,385.36		17,385.36		
C-50-F	55,102.43		55,102.43		
C-55-F	315,818.25		315,818.25		
C-55-T	24,721.23		24,721.23		
C-60-T	51,898.10		51,898.10		
A-7-F	60,869.25		60,869.25		
A-8-F	5,874.70		5,874.70		
All Others	$52,666,014.16	$28,983,995.70	$23,682,018.46	$	
Barter Trucks	15,713.03			15,713.03	Spfd. 55.03%
	152,586.77			152,586.77	
Attachments	$52,834,313.96	$28,983,995.70	$23,682,018.46	$168,299.80	
	12,541,202.06	6,901,423.49	5,639,778.57		Spfd. 55.03%
Parts	$65,375,516.02	$35,885,419.19	$29,321,797.03	$168,299.80	
	7,776,983.07		7,776,983.07		
Totals	$73,152,499.09	$35,885,419.19	$37,098,780.10	$168,299.80	

* Red in copy.

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SCHEDULE 4

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1938

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$6,622,384.81	$6,622,384.81	$	
D-5	317,309.19	317,309.19		
D-15	3,450,965.46	3,450,965.46		
D-30	9,274,835.98	9,274,835.98		
DS-30	1,108,379.09	1,108,379.09		
D-300	638,293.25	638,293.25		
DS-300	68,545.96	68,545.96		
D-35	4,343,216.85		4,343,216.85	
DS-35	1,862,073.71		1,862,073.71	
D-40	4,061,144.94		4,061,144.94	
DS-40	234,634.95		234,634.95	
D-50	1,262,664.73		1,262,664.73	
DD-50	6,738.53		6,738.53	
DS-50	46,205.41		46,205.41	
DR-50	243,062.47		243,062.47	
D-60	273,805.93		273,805.93	
DR-60	912,532.62		912,532.62	
DR-70	412,423.73		412,423.73	
DRD-70 6 cyl.	23,490.36		23,490.36	
A-8	173,113.70		173,113.70	
AD-8	5,979.23		5,979.23	
DS-186-T	5,659.71		5,659.71	
D-216-T	59,261.28		59,261.28	
DS-216-T	89,919.71		89,919.71	
D-246-T	93,374.30		93,374.30	
D-246-F	216,795.41		216,795.41	
DR-346-T	54,209.16		54,209.16	
D-346-F	249,866.17		249,866.17	

DR–426–F	178,549.08	.....	178,549.08		
DRD–426–F	6,777.89	.....	6,777.89		
AR–626–F	58,147.79	.....	58,147.79		
D–21–SB & D–31–SB	7,528.19	7,528.19	.....		
D–37–SB	11,374.54	.....	11,374.54		
D–43–SB	10,353.15	.....	10,353.15		
D–49–SB	28,581.83	.....	28,581.83		
D–55–SB	14,670.37	.....	14,670.37		
D–216–F	2,308.01	.....	2,308.01		
DR–246–T	10,618.43	.....	10,618.43		
C–1	85,463.44	85,463.44	.....		
C–5	1,940.97	1,940.97	.....		
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C–10, C–20	268.56	268.56	.....		
C–12, C–30, CS–30	13,496.54	13,496.54	.....		
C–35, CS–35, C–35–B, CS–35–B, and C–36	25,985.66	.....	25,985.66		
C–40, CS–40	12,723.64	.....	12,723.64		
C–50, CS–50	12,786.90	.....	12,786.90		
C–55, C–60	42,626.22	.....	42,626.22		
C–35–T, CS–35–T	5,944.00	.....	5,944.00		
C–40–T, CS–40–T, C–40–F	7,139.53	.....	7,139.53		
C–55–T, C–60–T, C–55–F	8,777.46	.....	8,777.46		
M–3	821.78	821.78	.....		
	$36,657,779.62	$21,590,233.22	$15,067,546.40	.....	Spfld. 58.89%
Others	6,940.03	.....	.....	6,940.03	
Barter	76,480.68	.....	.....	76,480.68	
	$36,741,200.33	$21,590,233.22	$15,067,546.40	$83,420.71	
Attachments	9,841,645.07	5,795,744.78	4,045,900.29	.....	Spfld. 58.89%
	$46,582,845.40	$27,385,978.00	$19,113,446.69	$83,420.71	
Parts	8,083,111.47	.....	8,083,111.47	.....	
Total	$54,665,956.87	$27,385,978.00	$27,196,558.16	$83,420.71	

SCHEDULE 5

International Harvester Company

Sales of Motor Trucks, Attachments, and Parts Separated Between Springfield, Fort Wayne, and Other Product Details

1939

Model	Total Proceeds	Springfield Product	Fort Wayne Product	Other Product
D-2	$8,235,347.15	$8,235,347.15	$	
D-2-M	6,692.69	6,692.69		
D-5	302,327.48	302,327.48		
D-15	3,939,477.64	3,939,477.64		
D-15-M	17,987.50	17,987.50		
D-30	10,270,907.53	10,270,907.53		
DS-30	1,912,439.49	1,912,439.49		
D-300	681,188.72	681,188.72		
DS-300	89,025.90	89,025.90		
D-500	29,864.90		29,864.90	
DS-500	2,017.44		2,017.44	
DR-500	6,323.35		6,323.35	
D-35	4,753,165.72		4,753,165.72	
DS-35	2,883,440.79		2,883,440.79	
D-40	4,913,318.24		4,913,318.24	
DS-40	1,392,243.38		1,392,243.38	
D-50	1,053,228.54		1,053,228.54	
DD-50	51,981.36		51,981.36	
DS-50	511,825.51		511,825.51	
DSD-50	22,046.67		22,046.67	
DR-50	621,628.76		621,628.76	
DRD-50	9,711.82		9,711.82	
D-60	256,236.39		256,236.39	
DD-60	3,395.81		3,395.81	
DR-60	980,199.03		980,199.03	
DRD-60	19,775.40		19,775.40	
DR-700	325,682.11		325,682.11	
DRD-70	90,715.22		90,715.22	
A-8	44,845.80		44,845.80	
AD-8	27,696.21		27,696.21	
D-186-T	4,493.41		4,493.41	
DS-186-T	6,771.16		6,771.61	
D-216-T	82,048.83		82,048.83	

DS-216-T	148,784.85		148,784.85		
D-246-T	60,014.27		60,014.27		
DD-246-T	10,495.01		10,495.01		
DR-246-T	53,637.68		53,637.68		
DS-246-T	46,115.02		46,115.02		
D-246-F	376,007.45		376,007.45		
DD-246-F	16,176.02		16,176.02		
DR-346-T	59,268.96		59,268.96		
DRD-346-T	22,949.77		22,949.77		
[fol. 165]					
D-346-F	153,131.08		153,131.08		
DD-346-F	26,309.02		26,309.02		
DR-426-F	80,241.03		80,241.03		
DRD-426-F	23,582.24		23,582.24		
AR-626-F	13,401.22		13,401.22		
ARD-626-F	13,255.37		13,255.37		
D-31-SB	17,475.46	17,475.46			
D-37-SB	15,956.78		15,956.78		
D-43-SB	15,511.86		15,511.86		
D-49-SB	31,658.91		31,658.91		
D-55-SB	40,699.10		40,699.10		
DR-700-T	8,848.41		8,848.41		
D-37-SBB	2,476.56		2,476.56		
D-500-T	2,799.05		2,799.05		
	$44,786,845.07	$25,472,869.56	$19,313,975.51	$	Spfld. 56.87%
Others	21,138.14			21,138.14	
Barter	73,624.15			73,624.15	
	$44,881,607.36	$25,472,869.56	$19,313,975.51	$94,762.29	
Attachmer	12,055,488.89	6,855,956.53	5,199,532.36		Spfld. 56.87%
	$56,937,096.25	$32,328,826.09	$24,513,507.87	$94,762.29	
Parts	10,347,853.96		10,347,853.96		
Total	$67,284,950.21	$32,328,826.09	$34,861,361.83	$94,762.29	

[fol. 166]

EXHIBIT B

International Harvester Company

Sales of Springfield Product

By Ohio Branch Houses

Branch House	Proceeds of Trucks and Attachments	% Springfield	Sales of Springfield Product
1936			
Cincinnati Farm Equipment	$8,097.09		
Cincinnati Motor Truck	897,158.53		
Cleveland Farm Equipment	4,402.78		
Cleveland Motor Truck	1,225,853.53		
Columbus	563,136.67		
Toledo	382,750.53		
	$3,081,399.13	55.455	$1,708,789.89
1937			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	$1,027,256.75		
Cleveland Farm Equipment	3,182.36		
Cleveland Motor Truck	1,450,007.66		
Columbus	649,489.05		
Toledo	445,737.01		
	$3,575,672.83	55.03	$1,967,692.76
1938			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	$791,126.54		
Cleveland Farm Equipment	969.20		
Cleveland Motor Truck	768,113.96		
Columbus	472,281.81		
Toledo	277,669.23		
	$2,310,160.74	58.89	$1,360,453.66
1939			
Cincinnati Farm Equipment			
Cincinnati Motor Truck	983,590.63		
Cleveland Farm Equipment	12,650.14		
Cleveland Motor Truck	1,259,985.94		
Columbus	632,991.71		
Toledo	378,205.64		
	$3,267,424.06	56.87	$1,858,184.06

[fol. 167] EXHIBIT C

International Harvester Company Sales of Works Collateral Parts by Springfield Plants

Year	*Amount*
1934	$252,522.76
1935	549,673.54

[fol. 168] IN THE SUPREME COURT OF THE STATE OF OHIO
INTERNATIONAL HARVESTER CO., APPELLANT,

v.

EVATT, TAX COMMR., APPELLEE

(No. 30316, Decided November 21, 1945)

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the

fee to the Treasurer of State. The Treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

The operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

In computing the numerator of the business-done fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) the value of goods sold during the preceding year in interstate commerce or (b) raw materials shipped from outside the state, whether partially fabricated or not, and used in the manufacturing process during the preceding year. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed).

The volume of sales during the previous year may be used as indicative of the volume of manufacture carried on in an Ohio factory and as a proper element of comparison with the volume of total business done by a corporation in [fol. 169] and out of the state. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed).

Where a foreign corporation maintains selling branches and warehouses in this state and all sales proceeds both of cash and notes are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there, the amount of business done in Ohio by such foreign corporation may be measured by the sales made by such selling branches regardless of where products so sold were manufactured or shipped from.

Where a corporation files its annual report with the Department of Taxation and fails to make a claim that it should be required to pay only five-sixths of its annual franchise tax fee by reason of its changing its accounting period from a calendar year to a fiscal year ending October 31, and where upon review under Section 5500, General Code, of the correctness of the determination of the value of its stock or the proportion of such value as made by the Tax Commissioner, the corporation fails to call to the attention of the Tax Commissioner its claim that by reason

of the change of its accounting year from a calendar year to a fiscal year it should not be charged more than five-sixths of the annual fee, such claim, if any, for reduction is thereby waived. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent upon the value certified by the Tax Commissioner and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation in this state during the preceding year.

Appeal from the Board of Tax Appeals.

This is an appeal from a decision of the Board of Tax Appeals, under Section 5611-2, General Code. The hearing before the board was upon stipulated facts and evidence.

During the years 1934 to 1939, both inclusive, appellant was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof and the sale of such products so manufactured. During the above period appellant owned and operated two factories in Springfield, Ohio, as well as factories in several other states. Throughout the years 1934 and 1935 all products of the appellant's Springfield factories were sold f.o.b. Springfield by the appellant to its subsidiaries, International Harvester Company of America, a Wisconsin corporation, International Harvester Export Company and International Harvester Company of Canada, Limited. During that period all United States sales of appellant's products were made by its subsidiary, International Harvester Company of America. During the years 1936 to 1939, inclusive, appellant marketed its products in this country through dealers located in about 37 states who were independent operators. Appellant's Ohio branches [fol. 170] during this period were located at Columbus, Cincinnati, Toledo and Cleveland. Retail stores and motor truck substations were located in fourteen other Ohio cities.

In its Ohio franchise tax returns for the years 1935 to 1940, inclusive, appellant listed the value of the business done by it in this state during the years preceding the date

of the commencement of its several current annual accounting periods at certain figures. Upon the audit of such returns the Tax Commissioner determined an increased value of the business done in Ohio for each of the several years in question. The difference between appellant's returns and the Tax Commissioner's determinations arose from a disagreement between the appellant and Tax Commissioner as to the meaning of the expression "the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period" as used in Section 5498, General Code. The figures listed by the appellant in its 1935 and 1936 returns included sales of products of appellant's Springfield factories made by the Ohio branches and retail stores of International Harvester Company of America, a subsidiary corporation. In its returns for 1937 to 1940, inclusive, appellant's figures included parts sales made at the Springfield factories plus sales of Ohio made products made by its Ohio branches and retail stores operated directly by appellant, commencing in 1936.

The Tax Commissioner used the value of all sales of the preceding year, wherever the products were delivered, as indicative of the value of the business done during the preceding year at the factories, plus the sales by branches, of goods manufactured outside Ohio but sold to Ohio customers.

The pertinent part of Rule No. 275 of the Tax Commissioner, which the Board of Tax Appeals held to be applicable in the present computation, provides as follows:

"In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In its decision the Board of Tax Appeals stated:

"From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the Tax Commissioner is modified."

It is contended by appellant that the Board of Tax Appeals erred:

(1) In sustaining the Tax Commissioner in including in the basis of his assessments sales of motor trucks in the years in question where the orders or contracts were solic-
[fol. 171] ited and accepted by appellant's branches outside the state of Ohio, and where the trucks were shipped from appellant's Springfield factories on the direction of such branches direct to buyers in other states;

(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio and, therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;

(4) In sustaining the tax assessed for ten months' fiscal period ending October 31, 1936, namely, for the period from January 1 to October 31, 1936, on a full year's basis, whereas such period was only a ten months' period and the tax should have been reduced to five-sixths of the annual tax;

(5) In its decision by making no deduction for the amount of goods sold by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts

solicited and accepted by branches of the company outside Ohio when the goods were shipped from the factory at Springfield direct to buyers in other states;

(6) By including in the business done in Ohio, in the basis of its additional franchise tax assessments for the years 1935 and 1936, based on business done and property held, respectively, in the calendar years 1934 and 1935, sales of motor trucks manufactured at appellant's Springfield factories and sold to appellant's subsidiary when the orders for shipment of such goods were sent by branches of appellant's subsidiaries outside the state of Ohio to appellant's Springfield factories and when the articles were shipped by the Springfield factories to other branches of appellant's subsidiary outside Ohio or to dealers or consumers residing in states outside Ohio.

Mr. O. H. Mosier, of Columbus, and Edward R. Lewis, of Chicago, Ill., for appellant.

Mr. Hugh S. Jenkins, attorney general, and Aubrey A. Wendt, of Columbus, for appellee.

[fol. 172] OPINION

TURNER, J.

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee or tax is based on the proportion of the corporation's property held or used in Ohio and of business done in Ohio by such corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated. The other part is multiplied by a fraction whose numerator is the value

of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during such year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

This case involves only the method used by the Tax Commissioner to the extent approved by the Board of Tax Appeals for ascertaining the numerator of the business-done part of the formula.

As stated by appellant, a foreign corporation doing business in Ohio, "there is no disagreement between the parties on this appeal as to the total net worth of International Harvester Company to which the Ohio allocation ratio is applied for each year, the amount of appellant's property in Ohio and its total property, and its total business for each of the years involved."

As stated by the Board of Tax Appeals in its journal entry, "consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved."

The Tax Commissioner treated the manufacturing done at appellant's factories in Ohio as business done in Ohio. As indicative of the value of such business done, the Tax Commissioner used the sales value of all appellant's Ohio manufactured products sold in the previous year whether to intrastate or interstate commerce.

As the Board of Tax Appeals reduced the Tax Commissioner's use of appellant's Ohio factories' production by 62 per cent on account of manufactured products shipped [fol. 173] from appellant's Ohio factories in each preceding year to warehouses in other states, appellant's complaint is now reduced to the use of 38 per cent of the sales value of the preceding year of products manufactured in Springfield and shipped by the Springfield works during a

preceding year direct to buyers in other states, as indicative of the value of business done at appellant's Ohio factories.

It is our opinion that the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of American Mfg. Co. v. City of St. Louis, 250 U.S., 459, 63 L. Ed., 1084, 39 S. Ct., 522, as stated by Mr. Justice Pitney at page 460 of that case:

"The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under Art. 1, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

In commenting on the American Mfg. Co. case, Mr. Justice Roberts said at page 312 in the case of J. D. Adams Mfg. Co. v. Storem, 304 U. S., 307, 82 L. Ed., 1365, 58 S. Ct., 913, 117 A.L.R., 429: "The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales." This is the method followed in the instant case. See, also, Aponaug Mfg. Co. v. Stone, 314 U. S., 577, 86 L. Ed., 467, 62 S. Ct., 131, affirming the case which arose below in Aponaug Mfg. Co. v. State Tax Commission, 190 Miss., 805, 1 So. (2d) 763; and C. H. Musselman Co. v. Alderson, Tax Commr., 315 U. S. 779, 86 L. Ed., 1187, 62 S. Ct., 580, both decided on authority of American Mfg. Co. v. City of St. Louis, supra.

In coming to its decision in the instant case the Board of Tax Appeals followed the holding of this court in the case of Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, 45 N. E. (2d), 118, in which we held:

"1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code).

"2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the for- [fol. 174] eign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales.

"4. The manufacturing operations within this state by a foreign corporation constitute business done by such corporation in this state within the meaning of Section 5498, General Code.

"5. Tax Commissioner's Rule No. 275 is not unreasonable or unlawful in its application in the instant case. Such rule is favorable to the taxpayer by eliminating from the base upon which the franchise tax is computed goods manufactured in Ohio and sold from warehouses outside of this state. Such rule eliminates the possibility of double taxation on account of 'business done' by the corporation in the state where sales of Ohio-manufactured goods are made from warehouses in such other state.

"6. In computing the numerator of the 'business done' fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio.

"7. A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state,

in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the 14th Amendment thereto. (American Mfg. Co. v. City of St. Louis, 250 U. S., 459 followed.)

"8. While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand it is settled by the decisions of the Supreme Court of the United States that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. (Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, followed.)

"9. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing local business, if apportioned to the business done or property owned within the state, is not invalid under the commerce clause of the federal Constitution merely because a part of the property or capital included in computing the tax is used by the corporation in interstate commerce, or because a part of the manufactured product is thereafter sold and shipped [fol. 175] in interstate commerce. (International Shoe Co. v. Shartel, Atty. Genl., 279 U.S., 429, and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U.S. 284, followed.)

"10. The validity of an excise tax upon a foreign corporation depends upon its operating incidence. The application of Section 5498, General Code, and Tax Commissioner's Rule No. 275 in computing appellant's franchise tax for the year 1939 produced no unlawful result under the evidence in this case."

Appellant in brief and argument attempts to treat the Ohio franchise tax as a sales tax, an income tax or a gross receipts tax, which it is not.

It is the contention of appellant that no portion of the value of the products manufactured in Ohio which were sold in interstate commerce may be considered as a measure of the business done in Ohio. In other words, if all the products of a manufacturing plant in Ohio were sold

in interstate commerce in the preceding year it would then follow that the corporation had done no business in Ohio in such factory.

In substance appellant contends that because some of the raw materials used by appellant in its Ohio manufacturing processes during a preceding year came into the state in interstate commerce and some of the finished products of the factories left the state in interstate commerce during a preceding year, the use of the sales value of the finished products of Ohio manufacture as an indication of the value of the business done in Ohio for the preceding year results in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside Ohio in violation of the due process clause of the United States Constitution.

In support of its contentions appellant cites cases decided by the Supreme Court of the United States involving taxes on income and on gross receipts. As these cases have been commented on in the case of Aluminum Co. of America v. Evatt, Tax Commr., supra, we shall not again review those cases here.

As to the case of International Harvester Co. v. Department of Treasury, 322 U. S. 340, 88 L. Ed., 1313, 64 S. Ct., 1019, cited by appellant, it is only necessary to quote the opening sentence of Mr. Justice Douglas' opinion to wit, "This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 * * * as construed and applied to certain business transactions of appellant companies." We find nothing in that case which would tend to indicate the invalidity of our statutory method of computation of the proportionate value of the issued and outstanding shares of a corporation doing business in Ohio.

This court is committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold.

[fol. 176] We are also committed to the proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state.

The present method of determining part of the base upon which to compute the fee, known as the franchise tax, by measuring the volume of business done in Ohio by the value of the sales of the Ohio manufactured products and comparing such result with the total amount of business wherever done computed by the same method, has been in use in Ohio for many years.

On April 15, 1915, the writer, as Attorney General, issued opinion No. 246 (Vol. 1, Opinions of Attorney General (1915), 460) to the Tax Commission of Ohio in the course of which it was said (page 462):

"I am of the opinion that the operation of factories in Ohio by a foreign corporation constitutes 'doing business' in Ohio regardless of where the products of such factory are sold * * * (Citing cases.)

"I am of the opinion that under the provisions of Section 5502, General Code, it is the duty of the commission to select some factor or criterion which will represent the volume of the business done in Ohio as compared with the volume of the business of the company as a whole; and that the business being manufacturing, and all manufacturing being for the purpose of sale, the sales of the products of the factories may be used as such a measure of the volume of the manufacturing business. When so used the sales do not represent commerce at all, but manufacture, and may just as appropriately be used for this purpose as any other criterion, such as the total value of the manufactured articles."

The present formula was spelled out by the General Assembly in 113 Ohio Laws, 637, passed April 6, 1929. Minor amendments were made in 114 Ohio Laws, 762, and 115 Ohio Laws, 589, which latter law became effective July 18, 1933, and is still in force as Section 5498, General Code.

Section 5495 of the General Code of Ohio defines the purpose for which the franchise tax is levied on both domestic and foreign corporations. As to foreign corporations it is provided therein: " * * * and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this

state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

Section 5499, General Code, charges a fee of one-tenth of one per cent of the value or the proportionate value of the shares of stock upon which such fee is charged.
[fol. 177] Section 5498, General Code, provides the means for determining the value of the outstanding shares of stock of a corporation (domestic or foreign) and prescribes the formula for determining the base upon which the fee provided for in Section 5499 of the General Code shall be computed, to wit: " * * * The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will. (It is agreed that the computation of the foregoing fraction is correct. The dispute is as to the computation under the second part which follows); take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

Section 5497, General Code, requires every corporation doing business in Ohio to submit to the Department of Taxation certain information including:

"7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

"8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business."

Section 5500, General Code, provides for a review of the correctness of the determination of the value of the stock, or the proportion of such value, as made by the Tax Commissioner under the provisions of the act which we have been discussing. In reading these sections of the statute the following provision of Section 1464, General Code, should be kept in mind:

"Whenever in any law of this state, in effect at, or after the time the Tax Commission of Ohio and the offices of commissioners or members of said commission shall, by the provisions of this act, be abolished, the term 'Tax Commission of Ohio,' 'commission,' 'commissioner,' or 'member,' meaning the Tax Commission of Ohio or the offices of the commissioners or members of said commission, which by this act shall have been abolished, is used, such term shall be construed as referring to the Department of Taxation, [fol. 178] the Tax Commissioner, the Board of Tax Appeals, or the members of said Board of Tax Appeals, as the provisions of this act may require."

Appellant also complains of the failure of the Board of Tax Appeals to make a deduction for the amount of goods sold in a preceding year by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio.

We are unable to find any evidence in the record of the amount of any such shipments. The record does contain the following stipulation:

"6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, to the user."

The record also contains the following stipulation:

"All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there."

The stipulation of facts discloses, for the several years, the amount of sales by Ohio branches to Ohio buyers, of goods manufactured outside Ohio. In its journal entry the board said: "All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users." Assuming that such distinction in computing the amount of business done in a preceding year is material and assuming further that the record discloses that "in a few instances" shipments from outside the state were shipped direct to users in Ohio on orders from branches in Ohio, we adopt the following reasoning of the board and hold that the decision of the Board of Tax Appeals was not unreasonable or unlawful in respect thereof, to wit:

"All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Co. of America v. Kentucky, 234 U.S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were concerned, it was engaged solely in interstate commerce and was, therefore, not subject to the jurisdicition of the state. The court held, however, that the continuous solicitation of orders through [fol. 179] local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for

the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Co. v. Department of Treasury, 322 U.S., 340, 88 L. Ed., 1313."

Under the Tax Commissioner's Rule No. 275, the Board of Tax Appeals eliminated from consideration 62 per cent of the volume of goods manufactured at appellant's Ohio factories, on the ground that such proportion of appellant's Ohio manufactured products were shipped to warehouses *outside* Ohio. For the governmental protection to appellant's 100 per cent manufacturing operations in Ohio the Department of Taxation has based its computation of the business fraction upon 38 per cent of the business done in Ohio at appellant's factories. By the use of Rule 275, the Board of Tax Appeals made a substantial reduction in the fee to be paid by appellant.

A subsidiary question is set out in appellant's brief. This question was brought about by appellant changing its accounting period from the calendar year to the fiscal year, which appellant claims resulted in assessing a full year's tax for a ten months' period. During the hearing before the board no complaint was made on that score so far as the record discloses. The only mention of such matter in the record is to be found in explanatory notes to appellant's exhibits, to the effect that the company had changed its accounting year to a fiscal year ending October 31. In its application for rehearing by the Board of Tax Appeals appellant states that no consideration was given to the point made in appellant's brief in respect to the fiscal period ended October 31, 1936. An examination of appellant's annual report for 1936 (a part of the period here) filed with the Tax Commission by appellant gives the date of beginning of the current annual accounting period as January 1, 1936. The 1937 report gives the date of the beginning as November 1, 1936, but there is no claim in either report that the company is not liable for the fee for a full year. The record does not disclose that such matter was brought to the attention of the Tax Commissioner upon review under Section 5500, General Code. Therefore such claim, if any, is waived. There is no provision in the statutes for remitting any portion of the fee. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth

of one per cent on the valve certified by the Tax Commissioner (Section 5499, General Code), and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation during the preceding year. (Section 5498, General Code.)

The form of reports for 1936 does contain the statement: "A corporation which filed its statement for admission to do business with the Secretary of State of Ohio on or after January 1, 1936, will not be required to file an annual report until 1937." Similarly the 1937 form makes the first filing date after admission as 1938. We hold that the decision of the Board of Tax Appeals is not unreasonable or unlawful in this respect.

As pointed out above, the instant case does not involve [fols. 180-180-A] a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, *supra,* which we approve and follow here, and in the instant case, we relied upon and now rely upon, *inter alia,* American Mfg. Co. v. City of St. Louis, 250 U.S., 459, 63 L. Ed., 1084, 39 S.Ct., 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U.S., 290, 66 L. Ed., 622, 42 S.Ct., 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U.S., 429, 73 L. Ed. 781, 49 S.Ct., 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U.S. 284, 71 L. Ed., 1049, 47 S.Ct., 639.

The record in this case discloses no instance of double taxation.

Upon hearing and consideration of the record and evidence in this case we are of the opinion that the decision of the Board of Tax Appeals appealed from is reasonable and lawful and, therefore, that decision should be and hereby is affirmed.

Decision affirmed.

Weygandt, C. J., Zimmerman, Matthias and Hart, JJ., concur.

Bell, J., concurs in paragraphs two, three, four, five and six of the syllabus and in the judgment.

Williams, J., not participating.

[fol. 181] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT, AND DESIGNATION BY APPELLANT OF THE PARTS OF THE RECORD TO BE OMITTED FROM THE PRINTED RECORD, WITH PROOF OF SERVICE THEREOF—Filed April 12, 1946

Pursuant to Rule 13, Paragraph 9, of this Court, Appellant states that the points upon which it intends to rely on this Appeal are as follows:

1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this Appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this Appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of Interna-

[fol. 182] tional Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of

such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

Appellant further states that the following designated parts of the Transcript of Record, prepared by the Clerk of the Court below, are not necessary for the consideration of the foregoing "Statement of Points" and should be omitted from the Printed Record herein, viz:

(1) Citation to Appellee (page 7).

(2) Service of Appeal Papers (page 8).

(3) Acknowledgment of Service of Appeal Papers (page 9).

(4) Appellant's Statement as to Jurisdiction (pages 10 to 43 inclusive).

(5) Praecipe for Record and Designation of Portions of Record to be Incorporated into Transcript (pages 57 to 58).

(6) Appeal Bond for Costs (pages 59 and 60).

(7) Ohio Supreme Court Clerk's Minutes (pages 61 and 62).

(8) Ohio Supreme Court Clerk's Journal Entries (page 63).

(9) From the Printed Record of the Supreme Court of Ohio the following should be omitted:

(a) From page 78, line 3, omit down to and including line 13 on the reverse of page 83, namely down to the words in the middle of the page "Charles L. Johns."

(b) Omit from beginning with line 11 on page 84 to bottom of page 90.

(c) Omit beginning with 4th line from bottom of the reverse of page 91 down to and including line 21 on the reverse of page 96, namely down to and including the line reading "withdrawing them."

(d) Omit on the reverse page of page 102 beginning with the 15th line, namely the line reading as follows:

[fol. 183] "Chairman Ford: At this point we will take a short" and all the rest of the reverse page of page

102, and all of pages 103, 104, 105 and 106 down to and including the 12th line on the reverse side of page 106, namely to the line reading "thousand, whatever it is."

(10) Omit Appellant's Exhibit 1, page 122, selling locations of International Harvester Company of America in 1934 and 1935.

(11) Omit pages 131 to 136 inclusive.

(12) Omit the certificate of the Clerk of the Supreme Court of Ohio.

Appellant designates all the remainder of the Record to be included in the Printed Record.

Dated this 10th day of April, 1946.

Edward R. Lewis, Joseph J. Daniels, O. H. Mosier,
Attorneys for Appellant.

PROOF OF SERVICE

STATE OF OHIO,
County of Franklin, ss.

O. H. Mosier, being first duly sworn, upon oath says that on the 11th day of April, 1946, he served on Hugh S. Jennings, Attorney General of the State of Ohio, a true copy of the above and foregoing "Statement of Points to be Relied Upon by Appellant, and Designation by Appellant of the Parts of the Record to be Omitted from the Printed Record, with Proof of Service Thereof," as evidenced by the Receipt therefor appearing below, signed in his presence by said Hugh S. Jennings as Attorney General.

O. H. Mosier.

Subscribed and sworn to before me, the undersigned Notary Public in and for said County and State, this 11th day of April, 1946. Witness my hand and Notarial Seal.
Annabel H. Miller, Notary Public, Annabel H. Miller.

[fol. 184] RECEIPT

Receipt of a true copy of the foregoing Statement of Points to be Relied Upon by Appellant, and Designation by

Appellant of the Parts of the Record to be Omitted from the Printed Record, with Proof of Service Thereof, is hereby acknowledged this 11 day of April, 1946.

Hugh S. Jenkins, Attorney General for the State of Ohio, Attorney for Appellee, Aubrey A. Wendt, Asst. Attorney General for the State of Ohio.

[fol. 184-A] File endorsement omitted.

[fol. 185] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 6, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 50722 Ohio, Supreme Court. Term No. 75. International Harvester Company, Appellant, vs. Tax Commissioner of Ohio. Filed March 29, 1946. Term No. 75. O. T. 1946.

FILE COPY

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FILED
MAR 29 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

EDWARD R. LEWIS,
JOSEPH J. DANIELS,
O. H. MOSHER,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1019

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, the Appellant, International Harvester Company, files this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from the judgment of the Supreme Court of Ohio in the cause of International Harvester Company, Appellant, vs. William S. Evatt, Tax Commissioner of Ohio, Appellee, reported in 64 N. E. (2nd) 53, 146 Ohio State 58, wherein the Supreme Court of Ohio affirmed the decision of the Ohio Board of Tax Appeals in the cause

wherein International Harvester Company had appealed from additional Ohio Franchise Tax assessments of the Tax Commissioner of Ohio for the years 1935 to 1940 inclusive. A copy of the Opinion of the Supreme Court of Ohio is appended hereto, as Appendix A.

Basis of Jurisdiction

Section 237 of the Judicial Code (28 U. S. C. 344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court by writ of error. By act of January 31, 1928, Chapter 14, Section 1 (28 U. S. C. 861a), the remedy by appeal has been substituted for writ of error in such cases.

The State Statute Involved

The statute of the State of Ohio, the validity of which as applied to the Appellant herein is involved, is the Ohio Franchise Tax on Foreign Corporations, found in Sections 5495 to 5499 of the General Code of Ohio.

Section 5495 provides for an annual fee or franchise tax levied on each domestic corporation "for the privilege of exercising its franchise during the calendar year," and on each foreign corporation "for the privilege of doing business in this State." The tax is based on a portion of the value of the total issued and outstanding capital stock of the corporation (Sec. 5498).

Section 5498 provides that after finding the total value of the issued and outstanding shares of stock of a foreign corporation, the commission shall proceed as follows:

"Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio, and whose denominator is the fair value of all its property wheresoever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

The resulting amount is subjected to a fee of 1/10th of 1%. Section 5499, General Code of Ohio.

Section 5611 of the General Code of Ohio provides that the remedy of the taxpayer is by appeal to the Ohio Board of Tax Appeals, which was the procedure followed in this case. From the decision of the Ohio Board of Tax Appeals, Appellant appealed to the Supreme Court of Ohio.

Date of Judgment to Be Reviewed and Date of Presentation of Application for Review

The date of the final decision and judgment of the Supreme Court of Ohio sought to be reviewed was November 21, 1945.

The Petition for Appeal was presented to and allowed by Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on February 19th, 1946.

Finality of Judgment

The Supreme Court of Ohio is the highest court in the State of Ohio. Ohio Constitution, Article IV, Sections 1 and 2. Its judgment became final on November 21, 1945.

The Nature of the Case

This appeal involves the Ohio Franchise Taxes assessed against International Harvester Company for the years 1937 to 1940, inclusive, based in the case of each year on the property held and business done by International Harvester Company in the preceding year.

The Ohio Franchise Tax is not a tax in lieu of a property tax, but an additional tax. The Ohio statutes provide for the taxation of real estate and personal property and Appellant's property in the State was, of course, subject to such general property taxation (Section 5328, General Code of Ohio).

There is no dispute as to the total value of the Appellant's outstanding and issued capital stock, nor is there any dispute as to the amount or value of Appellant's property in Ohio, or to total property on the basis of which a part of the Franchise Tax is assessed.

The sole question in dispute is the method employed for determining that part of the Franchise Tax based on an allocation and division of the Company's total annual business into (1) business done within Ohio, and (2) business done outside Ohio.

In making this allocation, the Board of Tax Appeals used inconsistent formulas as follows:

1. The Board allocated (and we believe properly) to Ohio business all sales solicited and secured by Appellant's Ohio branches from Ohio customers for products made at Harvester factories outside of Ohio, which products were shipped direct by the factory to the Ohio customers, this shipment, however, being made by direction of the Ohio branch which had previously obtained the customer's order and which kept all records of the sale and collected the purchase price.

2. Inconsistently, the Board of Tax Appeals also included in business done in Ohio similar transactions where the situation was exactly reversed, that is, nothing happened in Ohio except the manufacture of motor trucks at Appellant's plant at Springfield, Ohio, known as the Springfield Works of International Harvester Company, and the shipment of such trucks from the Springfield plant direct to customers outside of Ohio in response to a direction to make such shipment, sent to the Springfield plant by the Company's branches outside Ohio which had previously obtained and accepted the customer's order, kept all the accounts and received the sales proceeds.

This inconsistency in the formulas used was not a small error, having little effect on the Franchise Tax. Thirty-eight per cent (38%) in dollar volume of all motor trucks shipped from the Springfield plant [1] to points in the United States outside of Ohio during the four years on which the additional Franchise Tax assessments for 1937, 1938, 1939 and 1940 are based, were shipped direct to customers at the request of the respective Company's branches throughout the United States which had obtained each order and handled the transaction throughout, as stated above in paragraph 2.

The Board of Tax Appeals of Ohio modified the additional assessments of the Tax Commissioner, but sustained so much of the additional assessments as resulted from including in Ohio business sales of motor trucks produced at the Springfield plant, sold by branches outside of Ohio when the trucks were shipped direct from the Springfield plant to the buyer in States other than Ohio. This was done pursuant to Rule No. 275 of the Tax Commissioner, adopted October 13, 1939.

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[1] Hereinafter in this Jurisdictional Statement, all references to the Springfield plant refer to the Appellant's plant located at Springfield, Ohio.

Appellant then appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio, which affirmed the decision of the Board of Tax Appeals.

This appeal is limited to the Franchise Tax Returns for the years 1937 to 1940 inclusive. The amounts of additional Ohio Franchise Taxes under the assessments of the Tax Commissioner for the above years 1937 to 1940 inclusive, reduced in accordance with the decision of the Supreme Court of Ohio, are given in the following table:

Year	Increased Capital Stock Valuations	Increased Franchise Taxes
1937	$12,509,000	$12,509.00
1938	11,350,000	11,350.00
1939	12,158,000	12,158.00
1940	14,098,000	14,098.00
Total		$50,115.00

Rule No. 275, adopted October 13, 1939 by the Tax Commissioner of Ohio, reads as follows:

> "Rule No. 275. Business done in and out of Ohio. Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made" (R. 118).[2]

[2] Page references to Record refer to block printed page numbers at top of page, not to red stamped numbers at the bottom.

International Harvester Company is a corporation of the state of New Jersey, with general business and accounting offices located in the city of Chicago, Illinois. It is engaged in the business of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof, and the sale of such products (R. 108).

During the years 1936 to 1939, inclusive, it operated four factories in Chicago, namely the McCormick Works, McCormick Twine Mill, Tractor Works and West Pullman Works, as well as factories in Auburn, N. Y., Milwaukee, Wis., Chattanooga, Tenn., Canton, Rock Falls, Rock Island and East Moline, Illinois, New Orleans, La., two factories in Springfield, Ohio, factories at Fort Wayne and Richmond, Indiana, and also for part of such period a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (R. 108).

International Harvester Company operated in the years 1936 to 1939, inclusive, more than 100 selling branches in the United States, selling agricultural implements and machines, tractors, motor trucks and kindred lines and repairs therefor, and binder twine to dealers and users; also a number of retail stores known as McCormick-Deering Stores, selling at retail to the public; and also a number of retail motor truck substations selling motor trucks at retail to the public, and occasionally selling, at wholesale, motor trucks to dealers. These McCormick-Deering Stores and motor truck substations were under the supervision of the branch house in whose territory they were located (R. 110).

The Ohio branches of International Harvester Company in 1936 to 1939, inclusive, were located at Columbus, Cincinnati, Toledo and Cleveland. The McCormick-Deering Stores in Ohio of Appellant in the same period were lo-

cated at Greenville, Van Wert, Ashland, Bellevue, Canton, Findlay, Marion, Troy, Wooster, Hamilton and Portsmouth. The motor truck substations in the State of Ohio in the same period were located at Akron, Springfield and Youngstown (R. 110).

The goods were shipped f.o.b. factory to the branches for sale by the branches, or direct to the dealers, or in a very small percentage of sales direct to the user purchasing from the branch.

Except for a small amount of sales of miscellaneous castings and repair parts direct to customers made by the factories, all sales in the United States of agricultural implements and machines, motor trucks, tractors and kindred lines to dealers and consumers were made on orders solicited by representatives of the selling branch in whose territory the buyers were located, or on orders received by mail by the selling branch. All orders and contracts for the sale of goods were accepted by the branch manager of the branch in whose territory the buyers were located (R. 112).

The sales proceeds, cash and notes for all machines and implements sold by a branch are received by the selling branch and interest and principal on the notes are collected by the branch making the sale (R. 112).

Except for miscellaneous castings and repair parts above referred to, which are sold direct by the factories, the function of the factories is limited to the manufacture of the goods, and the shipment thereof when manufactured to the selling branches or to subsidiaries, or direct to the purchasers on orders received from the branches in the case of sales in the United States, or from the general office in Chicago in the case of sales to subsidiaries or to jobbers in foreign countries (R. 113).

When goods are sold by a branch, the branch either delivers the articles from its own warehouse stock, or directs that the goods be shipped by the factory direct either to the dealer or, in a very small percentage of cases, direct to the consumer (R. 113).

Delivery of motor trucks from the Springfield plant was made partly by rail shipments from the factory to the branch, or direct to the dealers, but chiefly by driveaway by independent driveaway companies from the factory to the branch or to the dealer, or by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory direct to the consumer or delivery was made at the factory to the consumer who drove his own truck away (R. 114-115).

The Federal Questions Involved Are Substantial

The Federal questions involved on this appeal arise from the inclusion in business done in Ohio in computing the Ohio Franchise Taxes of Appellant for the years 1937 to 1940 inclusive of sales of trucks produced at Appellant's Springfield, Ohio, motor truck plant, when the sales were made on orders solicited and accepted by Appellant's branches outside of Ohio and the trucks were shipped on orders of the branches outside Ohio from the factories direct to the buyers, dealers or consumers on the orders of the outside branches. This is the very same class of sales which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, were sales subject to the Indiana Gross Income Tax if the branch and the buyer were both located in the State of Indiana and the factory was located outside the State of Indiana.

The same sales were used in determining the amount of franchise taxes in 9 states and income taxes in 32 states and the District of Columbia.

In the computation of the tax, sales of Springfield trucks are included in Ohio business when the sales were made by branches of Appellant outside Ohio and the trucks were shipped direct from the Springfield factory to the buyers in other states, although Appellant included in its Ohio franchise tax returns and the Commissioner has based his assessments on the inclusion of sales of goods manufactured outside of Ohio, which were sold by Ohio branches and shipped direct from factories or warehouses of Appellant outside Ohio to Ohio buyers.

The two Federal Questions involved on this appeal are:

1. Does the inclusion as Ohio business of the sales described above deny Appellant due process of law under the 14th Amendment to the Constitution of the United States, as taxing property and business outside of Ohio, the taxing jurisdiction?

2. Does the inclusion of such sales in Ohio business lay a burden on interstate commerce?

There Is a Substantial Federal Question Whether the Inclusion of the Above Sales as Ohio Business Denies Due Process of Law under the Fourteenth Amendment.

In its decision in this cause, the Supreme Court of Ohio has upheld the inclusion in the numerator of the business fraction of the Ohio Franchise Tax of sales of motor trucks produced at the Springfield plant of the Appellant where the orders or contracts were solicited and accepted by branches of the Appellant outside of Ohio, and the trucks were shipped by the factory at Springfield on orders of

the selling branches in other states direct from the factory to the buyer, either dealer or consumer. This is on the theory that under Rule No. 275 the sales were made from Ohio warehouses. The branches outside of Ohio received the sales proceeds, and collected the notes given in payment when they became due. The Springfield plant has no salesmen and has nothing to do with handling sales orders. When the Springfield plant ships a truck, it makes out a property invoice which it sends to the branch making the sale on which no dollars or cents are shown. It was testified that the plant "is not interested in" and has "nothing to do with dollars and cents" (R. 99). The customer is billed by the branch house (R. 101).

We submit that it is anomalous to say that these sales are made from an Ohio warehouse. And this contention necessarily involves a substantial Federal question, namely the question whether such sales have a situs in Ohio, and whether it does not deny due process of law for Ohio to include as Ohio business sales which are made from branches outside the State.

The Record shows that the factory at Springfield is merely a factory and a shipping point. The Springfield plant has no warehouse whatever. As soon as a truck is completed it is shipped out and must be shipped out, for there is no roo mfor it at the plant (R. 96). Every essential step in the sale except the shipment of the truck is done outside of Ohio, and the shipment itself is made on the direction of the branch outside Ohio. The business is handled in exactly the same way in the case where the sale is made from the branch house floor and in the case where the branch directs the truck to be shipped direct to the buyer. In each case the outside branch accepts the order and receives the proceeds. In one case it delivers the truck from the branch house floor. In the other case,

it directs the Springfield plant to ship the truck to the buyer. It is a fair inference that the shipment of the truck direct to the buyer is done either to save time or transportation charges.

It is obvious that these sales are of the very same class which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, would be subject to the Indiana Gross Income Tax if the contract were accepted by an Indiana branch of International Harvester Company, and the buyer lived in Indiana. In that case the goods were manufactured outside Indiana and shipped direct to the buyer in Indiana on the direction of the branch in Indiana which accepted the sale contract. We submit that it is impossible for the same sale to be an Indiana sale under the Class E category in the above case, and also an Ohio sale for the purposes of the Ohio Franchise Tax. Yet that is exactly what the Ohio Tax Commissioner's inclusion of these sales as Ohio sales comes to. It would seem to follow that the franchise tax value created by such sales has a situs outside of Ohio.

There is, therefore, serious question whether Ohio has jurisdiction over these sales, entitling it to use them as the measure of business done in Ohio for the purpose of computing the Ohio Franchise Tax. If the sales are not Ohio sales but sales of the states where the branches and buyers are located, as decided in the case of *International Harvester Company, et al.* v. *Department of Treasury, et al., supra*, it would follow that it is a denial of due process of law under the Fourteenth Amendment for Ohio to include them as Ohio business done.

The taxing of extra-territorial values is accomplished in the instant case by the illogical interpretation of the statutory words "business done" as meaning in the case

of business done in Ohio both Ohio sales and Ohio manufacturing activity and as meaning in the case of total business done everywhere only sales everywhere. The same statutory words "business done" are given a double meaning as respects Ohio business, but only a single meaning as respects business everywhere. Consistency and logic, not to mention the due process clause, require that the concept of "business done" be given reciprocal and correlative encompassment in the numerator and denominator of the business done fraction. If both Ohio sales and Ohio made goods are to be included in the numerator, then both sales everywhere and goods made everywhere should be included in the denominator.

However, since the formula adopted by the Ohio Tax Commissioner and by the Courts below uses sales everywhere as the sole element in the denominator, it follows that the numerator must necessarily consist only of sales in Ohio. The use of a business done fraction with such a correlated numerator and denominator, would avoid measuring the tax by extra-territorial values and would be consistent with the requirements of due process under the decisions of this Court.

This question of constitutionality is brought into glaring focus by the utterly inconsistent position of the Ohio Tax authorities and the Courts below in using as the measure of the tax sales by branches outside of Ohio of trucks produced at the Springfield plant, when the trucks were shipped direct from the Springfield factories to buyers in other states, and yet at the same time including sales by Ohio branches of goods shipped from factories and warehouses outside Ohio direct to the buyers in Ohio.

The undisputed evidence showed that in determining Ohio business no deduction had been made of sales by

Ohio branches, where the goods were shipped from places of business of the Appellant outside Ohio direct to the buyers in Ohio (R. 53).

We submit that there is no possible basis for defending the inconsistency in including in Ohio business sales by branches outside of Ohio, where the trucks were shipped from the Ohio plant to out of state buyers, and at the same time including sales by Ohio branches where the goods were shipped to Ohio buyers from factories or warehouses of the Appellant outside of Ohio. To include both classes of sales in Ohio business must necessarily be to include one class of sales which does not constitute business done in Ohio, and therefore to tax property and business outside the jurisdiction of Ohio, and consequently to deny due process of law under the Fourteenth Amendment.

Appellant submits that the volume of sales by Ohio branches to Ohio buyers, where the goods were shipped from factories outside of Ohio direct to the buyers in Ohio, was considerable as it was in the case of the sales of Springfield trucks by branches outside of Ohio, shipped from the Springfield plant direct to buyers in other States on sales by branches in those States.

But after all the amount of sales is immaterial, for of course we agree that sales by Ohio branches to Ohio buyers of goods manufactured outside of Ohio, which were shipped direct from factories or warehouses outside of Ohio to the buyers in Ohio, may properly be considered Ohio business. Appellant included such sales as Ohio business on its returns. But if such sales are Ohio business, then inescapably sales by Ohio branches of Springfield motor trucks shipped direct from the Springfield factory to buyers in other States are not Ohio business. *International Harvester Company, et al.* v. *Department of Treasury, et al., supra.*

The result of including these sales in Ohio business is a distorted formula, which inevitably allocates to Ohio a disproportionate and arbitrary percentage of Appellant's capital stock value.

Although the amount of Ohio business done was materially reduced by the Ohio Board of Tax Appeals from the figure found by the Tax Commissioner by excluding sales by branches outside of Ohio off their own warehouse floors, nevertheless there still remains in Ohio business, taking the year 1939 as an example, the amount of $11,578,844, representing sales of Springfield trucks sold by branches outside of Ohio which were delivered by shipment direct from the factory to buyers in other States (R. 84, 85, Appellee's Ex. G). If this amount is excluded from Ohio business, the resulting Ohio Franchise Tax on the business done fraction would be $11,109.00.[3] If the amount of Ohio business on the basis of the decision of the Supreme Court of Ohio is used as the numerator, namely $24,411,518.00, the resulting tax on the business done fraction would be

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[3] Tax on Business Done Fraction by excluding from business done in Ohio sales by branches outside of Ohio of Springfield motor trucks sold by branches outside Ohio, where the trucks were shipped from the Springfield plant direct to dealers and users outside of Ohio.

$12,832,674 Ohio Business Done
$213,001,465 Total Business Done = 6.0246% multiplied by $184,392,489
(one-half capital stock value) = $11,108,910.
Franchise Tax at 1/10% = $11,109

$12,832,674 Ohio business is made up as follows:

$8,125,736 Ohio business per Appellant's original Franchise Tax Returns, consisting of sales of Ohio branches to Ohio buyers, plus Works collaterals sold direct to customers (R. 126).
4,706,938 Sales of Springfield trucks to subsidiaries. (Appellee's Ex. G-A-2)
$12,832,674

$213,001,465 Total Business (R. 127).
$184,392,489 is one-half total capital stock value of $368,784,979 (R. 127).

$21,132.00.[4] If the sales of Springfield trucks shipped direct to buyers in other States were deducted and also shipments of trucks to subsidiary companies, the resulting tax on the business done fraction would be $7,034.00.[5] The computations are shown in a footnote.

This Court held in its decisive opinion in the case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, that the North Carolina income tax on Hans Rees' Sons, Inc., a New York corporation, denied due process of law under the 14th Amendment because it allocated to North Carolina an excessive and arbitrary amount of the total net income of Hans Rees' Sons, Inc. The total net income was allocated to North Carolina solely on the ratio of tangible property in

---

[4] Tax on Business Done Fraction under decision of Supreme Court of Ohio:

$$\frac{\text{\$24,411,518 Ohio Business}}{\text{\$213,0001,465 Total Business}} = 11.4607\% \text{ multiplied by \$184,392,489 (one-half capital stock value)} = \$21,132,670$$

Franchise Tax at 1/10% = $21,132

$24,411,518 Ohio business is made up as follows:

$8,125,736 Ohio business per Appellant's returns
4,706,938 Sales of Springfield trucks to subsidiaries
11,578,844 Sales by branches outside Ohio of Springfield trucks shipped direct from the Springfield plant to dealers and users outside Ohio

$24,411,518

The amount of $11,578,844 is arrived at by deducting $1,858,184 sales of Springfield trucks by Ohio branches (R. 84) from $32,328,826 total sales of Springfield trucks to dealers and users in the United States (Appellee's Exhibit G-A-2) and taking 38% of the balance of $30,470,642.

[5] Tax on Business Done Fraction, Ohio Business and Total Business as reported in Appellant's Returns:

$$\frac{\text{\$8,125,736 Ohio Business}}{\text{\$213,001,465 Total Business}} = 3.8148\% \text{ multiplied by \$184,392,489 (one-half capital stock value)} = \$7,034,205.$$

Franchise Tax at 1/10% = $7,034.

North Carolina to total tangible property. This Court held that the North Carolina formula as applied to Hans Rees' Sons, Inc. was unreasonable and arbitrary in that it attributed to North Carolina a percentage of income "out of all appropriate proportion to the business transacted by the Appellant in the State." This Court said that where a corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the Federal Due Process Clause "be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State" (R. 133).

In the Ohio Franchise Tax assessments involved in this appeal one tax on one-half of the entire capital stock value is measured solely by the percentage of business done in Ohio. Almost half of the total Ohio business used in the assessment consists of sales made outside of Ohio which are subject to sales and gross receipts taxes and are used as the measure of income and franchise taxes in States outside of Ohio.

The use of an arbitrary allocation formula which results in attributing an excessive tax value to the taxing state, as in the *Hans Rees'* case and in this case, is invalid as an attempt by the State to tax extra-territorial values and a denial of due process of law, upon the same grounds that the attempt to tax the full value of the entire capital stock value of the foreign corporation was condemned in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, and *Looney* v. *Crane & Co.*, 245 U. S. 178, and upon the same grounds that the attempt to fix an arbitrary value of $100.00 per share on no par capital stock actually worth only $7.00 per share (notwithstanding the application of a fair allocation formula to such arbitrary value) was condemned in *Air-Way Electric Corporation* v. *Day*, 266 U. S. 71. The validity of the Ohio

formula as applied in this case therefore raises a substantial Federal question.

Unlike the Texas franchise tax upheld in *Ford Motor Co. v. Beauchamp,* 308 U. S. 331, which was measured solely by receipts from local intrastate sales to Texas buyers, the Ohio tax uses extra-state sales as a measure of the tax on one-half of the capital stock value. No decision of this Court to date has given validity to that basis of tax, and the Court has expressed the view that extra-state values may not be so utilized as to attribute an excessive proportion of the corporate stock or net worth or income to the taxing State.

If the ratio of Ohio property to total business were the sole measure of the Ohio tax, approximately 1/40th of the capital stock value would be attributed to Ohio. If the ratio of Ohio business to total business, as reported on Appellant's Ohio Franchise Tax Returns, were the sole measure, approximately 1/26th of the capital stock value would be attributed to Ohio. But again, if the business ratio were the sole ratio and if the extra-state sales were added to the amount of Ohio business, approximately 1/9th of the entire capital stock value would be attributed to Ohio. On the basis approved by the decision of the Supreme Court of Ohio, utilizing the extra-state sales in the measure of Ohio business, and allocating one-half the capital stock value on the property fraction and one-half on the business done fraction, approximately 1/14th of the entire capital stock value is attributed to Ohio.[6] If, therefore, all of the 48 States and the District of Columbia levied a franchise tax on the basis of the Ohio tax, the total stock value taxed would be greatly in excess of the actual total value. Both in

[6] These percentages are based on business done and the capital stock value in the business year 1939, as a sample. (R. 126-127; and Example 2 in footnote of this Statement, page 15.)

theory and in practice, the Ohio tax therefore taxes extra-territorial values and is a denial of due process of law.

There Is a Substantial Federal Question Whether the Use of Such Extra-state and Interstate Sales as a Measure of the Ohio Franchise Tax Imposes a Burden on Interstate Commerce in Violation of the Commerce Clause of the Federal Constitution.

The assessments involved in this appeal result from including in Ohio business sales of motor trucks produced at Springfield, Ohio, sold by branches located outside Ohio all over the United States and shipped on orders of those branches direct from Springfield to the buyers in States other than Ohio. We submit that these sales are either sales in interstate commerce, or they are extra-state commerce.

If they are extra-state sales, we contend, as we have argued above, that Ohio has no jurisdiction to tax such sales or use them as a measure of a tax under the due process clause of the Fourteenth Amendment.

If they are interstate commerce sales, we submit that to use them as a measure is to lay a burden on interstate commerce in violation of the Commerce Clause.

As we have earlier stated, the Ohio Franchise Tax is really two taxes. There is one tax on one-half of the capital stock value based on the property fraction. It has nothing to do with the other tax, which is a tax on one-half of the capital stock value based on the business done fraction. As either fraction goes up or down, the tax under that fraction is separately and independently affected. Therefore, an increase in Ohio business done directly and necessarily results in an increase of Ohio Franchise Tax. Accordingly, we submit that to measure one of the two taxes by using in the numerator of the fraction gross receipts from sales made

in interstate commerce is to lay a burden on interstate commerce, forbidden by the Commerce Clause.

It is true that in *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, which was followed by *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, the Illinois Franchise Tax was upheld when there was included in Illinois business sales by the taxpayers of goods manufactured in Illinois where the orders were accepted in Illinois and the goods were shipped from the Illinois factories direct to buyers in other States. This Court said that while the sales were in interstate commerce, they did not directly affect the taxes because the amount of property in Illinois might go down while the sales in Illinois were increasing, and vice versa. In the Illinois tax, there is a unitary formula allocating a percentage of corporate value to Illinois by dividing the sum of Illinois business and property by the sum of total business and property.

In the first place, there were far more important Illinois elements in the handling of the Hump Hair Pin and Western Cartridge Illinois business than there were Ohio elements in the handling of the trucks shipped from the Springfield plant of International Harvester Company in this case. In the *Hump Hair Pin* and *Western Cartridge* cases the goods were made in Illinois, the contracts were accepted in Illinois, the offices handling the business were located in Illinois, and the proceeds were received in Illinois. In the case of our Ohio Franchise Tax, the orders were accepted by branches all over the country which handled the transactions from beginning to end. The factory at Springfield is not a sales office at all, knows nothing about sale contracts, nothing about prices, and does not receive the sales proceeds (R. 96, 112).

Moreover, and far more important, in the case of the Ohio Franchise Tax, since there really are two taxes, if

the amount of Ohio business increases, the tax increases. The United States Supreme Court said in the *Hump Hair Pin* and *Western Cartridge* cases that the effect of including interstate sales in the Illinois business was remote and indefinite and might not increase the tax at all. On the other hand, the effect of including the sales in question in Ohio business done is definite and immediate and almost doubles the tax. The property fraction does not affect the tax under the business done fraction, and the tax under the business done fraction does not affect the tax under the property fraction. Accordingly, we submit that under the very distinction made in the *Hump Hair Pin* and *Western Cartridge* cases, the inclusion of the sales in question as Ohio business done lays a burden on interstate commerce.

But the vital and compelling reason that the inclusion of the sales in question as Ohio business results in laying an invalid burden on interstate commerce is that the very same sales are used as the measure of business done or gross receipts or sales in many states where the Appellant has its branch houses.

We note that the Supreme Court of Ohio states "The record in this case discloses no instance of double taxation." We think this is surprising, in view of the fact that the record shows that the Appellant does business in 9 states which have franchise taxes, and 32 states and the District of Columbia which have income taxes, and that in every one of those states the Appellant makes its franchise and income tax returns, and returns as sales or gross receipts in the taxing state the sales made by the branches in that state, without excluding sales of goods manufactured outside of the state of the selling branch. (R. 55, 56, 90). It is also surprising in view of the decision of this Court in *International Harvester Company* v. *Department of Treasury*, which upheld the imposition of

sales and gross receipts taxes by states in which both the sales branch and the buyer are located.

We have seen that $11,578,844.00 of sales in 1939, for example, consisted of sales of motor trucks produced at the Springfield, Ohio, plant on contracts solicited, obtained and accepted by Appellant through its branches in other states with delivery of the trucks being made by shipment from the Springfield plant direct to the buyers in other states. Accordingly, so much of the above sales of $11,578,844.00 as were sales made by branch houses in the 9 franchise tax states and in the 32 income tax states and the District of Columbia where the Appellant does business, are used as a measure not only under the contested Ohio Franchise Tax assessments, but were also used as the measure of franchise and income taxes in other taxing jurisdictions. A direct gross receipts tax on the Indiana portion of such sales was upheld in *International Harvester Company* v. *Department of Treasury, supra,* thereby permitting all such sales to be subjected to direct sales and gross receipts taxes in states other than Ohio.

The egregious error of the Ohio Supreme Court in this case lies in its failure to recognize the development of the law made by this Court in *International Harvester Company* v. *Department of Treasury,* a decision that overruled the Court's long-standing pronouncement made in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. The Ohio Court decided the instant case upon the authority of its prior decision handed down in 1942 in *Aluminum Company of America* v. *Evatt, Tax Commissioner,* 140 Ohio State 385; 45 N. E. (2nd) 121, in which it said:

> "If Ohio-manufactured goods are shipped to a warehouse in another State where the sale would constitute doing business within such State, the Commissioner's rule eliminates the value of such goods from consideration. There is therefore no opportunity for

double taxation, as *goods which do not come to rest before sale do not lose their character of interstate commerce in the state of delivery.*" (Italics supplied.)

But this Court in 1944 in *International Harvester Company ,et al.* v. *Department of Treasury, et al., supra* repudiated the theory that the sale of goods, coming into a state in fulfillment of contract of sale made between a local seller and a local buyer, could not be taxed in the state of destination. That case held definitely that Indiana *could* tax sales of goods manufactured outside Indiana in a case where the branch and buyer were located in Indiana and the goods were shipped direct from a factory or warehouse outside of Indiana to the buyer in Indiana.

We submit, therefore, that contrary to the view expressed by the Court below, we have shown very positively that there is glaring double taxation resulting from the inclusion of the sales in question as business done in Ohio. This double taxation would arise not only under the Indiana Gross Income Tax and similar taxes on gross receipts in other states, but also under the franchise taxes of nine states and income taxes of 32 states and the District of Columbia.

This Court said in *International Harvester Company, et al.* v. *Department of Treasury, et al., uspra,* that it would "cross that bridge when we come to it," namely the bridge of double taxation. We respectfully submit that we have come to the bridge of double taxation.

There is therefore a very substantial Federal question involved as to whether the inclusion of sales made by branches all over the country of goods manufactured in Ohio and shipped from the Ohio factory to the buyers is not to lay a multiple and invalid burden on interstate commerce.

But the Supreme Court of Ohio finds jurisdiction to include the sales in question as Ohio business under the authority of the case of *American Mfg. Company* v. *St. Louis*, 250 U. S. 459. In other words, inclusion of the sales in question as Ohio business is justified on the ground that it is the manufacturing activity of the Appellant in Ohio which is being taxed. The Supreme Court of Ohio declares that "the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of *American Mfg. Company* v. *City of St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522 • • •."

But we submit that the tax in the case of *American Mfg. Co.* v. *City of St .Louis, supra*, was an entirely different tax from the Ohio Franchise Tax. The City of St. Louis tax was a tax on the privilege of manufacturing, measured by the gross receipts wherever received by a corporation manufacturing in the City of St. Louis. It was not a franchise tax on the privilege of doing business in the city as a corporation, but the tax was definitely and specifically laid on the manufacturing activity.

In the case of *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, this Court expressly distinguished the St. Louis tax from the Indiana Gross Income Tax, stating that the St. Louis ordinance was definitely and specifically laid on the manufacturing activity, whereas the Indiana Gross Income Tax was "not a tax on the manufacture but a tax on gross sale" (R. 313).

The Ohio Franchise Tax is even more vitally different from the St. Louis tax than is the Indiana Gross Income Tax. The Ohio tax is not a tax on the manufacturing activity at all. It is a tax on the privilege of doing business

as a foreign corporation in Ohio, and the business may be one or many things—manufacturing, mining, wholesaling or retailing.

The Supreme Court of Ohio states in its opinion that it is "committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold," and that it is also committed to the "proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state."

Of course Appellant does not contend that manufacturing is not doing business. It does not contend that Ohio cannot tax the manufacturing activity of the Appellant in Ohio. It does contend that the Ohio Franchise Tax is not a tax on the manufacturing activity, but that it is a franchise tax on the doing of business by the corporation. Embodying two distinct tax bases, one tax is based on such proportion of one-half of the capital stock value as is found by the property fraction, and another tax on a proportion of one-half the capital stock value, based on the business done fraction.

It is obvious that under the property fraction Ohio is already taxing the manufacturing activity in measuring a separate tax by the property used in such manufacturing. The investment in the manufacturing plant, real estate, buildings, inventories, machinery and equipment is ordinarily a fair barometer of manufacturing activity.

If Ohio wishes to go further to reach the manufacturing activity with a specific excise tax, the way is open of course for its legislature to take steps to reach it. But we contend that since the Ohio Franchise Tax is not imposed on

the manufacturing activity, it is not permissible to distort its nature by making it partly a tax on the selling activity and partly on the manufacturing activity.

To our minds, the most conclusive reason why the taxes involved on this appeal are not taxes on the manufacturing activity is that the assessments as approved by the Ohio Board of Tax Appeals and the Supreme Court of Ohio have excluded all sales of Ohio produced trucks of the Appellant where the trucks were sold by branches of International Harvester Company outside Ohio from their own warehouse floors. The assessments as approved by the Ohio Board of Tax Appeals and the Supreme Court of Ohio include Ohio manufactured goods in the measure of the Ohio business when the trucks are shipped from the Ohio factory direct to the buyers, but do not include them when the trucks are sold by the branch and delivered from the branch house warehouses. The Ohio manufacturing activity is as great in one case as in the other. It is obvious that it is not the manufacturing activity which is being reached.

Moreover, as we have already shown, there is included in Ohio business done all sales by the Ohio branches of International Harvester Company of goods manufactured outside of Ohio and sold by the Ohio branches, whether delivered off the Ohio branch house floors or shipped from factories outside of Ohio direct to the buyers in Ohio on sales approved by the Ohio branches.

In addition, the evidence showed that the Springfield, Ohio, plant was largely an assembly plant. Only 15.94% of the total cost of production in 1936 was Springfield labor. In 1937 the percentage was 17.10%, in 1938, 15.32% and in 1939, 11.61%. The manufacturing activity, therefore, was from 82% to 88% outside of Ohio (Exhibit 6, R. 106).

It cannot be said, therefore, that Ohio is reaching the Ohio manufacturing activity. It does not reach it in the case of Ohio manufactured goods delivered off branch house floors outside of Ohio, and it reaches the Appellant's manufacturing activity in other states when the goods made at out-of-state factories are sold by Ohio branches.

The Manner in Which the Federal Questions Were Raised

The Federal questions here presented were raised in Appellant's appeal from the assessments made by the Ohio Tax Commissioner to the Ohio Board of Tax Appeals and again in the appeal from the Board's decision to the Ohio Supreme Court.

In the "Entry" of the Board of Tax Appeals, deciding the case, the Board said:

> "It is contended that the tax assessments in question violate the due process and commerce clauses of the United States Constitution. The full and careful consideration by the Supreme Court of Ohio of the questions raised in *Aluminum Company of America* v. *Evatt,* supra, so completely answers the claims of the appellant in this case that it is unnecessary to discuss the cases cited by appellant, some of which were considered in the opinion in that case" (R. 140).

In its opinion the Court below sets out the assignments of error of the Appellant, numbers (2) and (3) of which are as follows:

> "(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio, and,

therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

"(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;" (42 N. E. (2d) 55).

The Court below again states the contentions of Appellant that the assessments in question would result "in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside of Ohio in violation of the due process clause of the United States Constitution" (42 N. E. (2d) 58). In its opinion the Court rejected those contentions.

Appellant fully presented the Federal questions raised in this appeal. Both the Board of Tax Appeals and the Supreme Court of Ohio definitely noticed the Federal questions and decided them, and further reference to the manner in which such questions were raised is unnecessary.

Whitfield v. *State of Ohio*, 297 U. S. 431.

Cases Believed to Sustain Jurisdiction

Cases believed to sustain jurisdiction

Appellant believes that the following cases sustain the jurisdiction of this Court:

International Harvester Company, et al. v. *Department of Treasury, et al.*, 322 U. S. 340.

Cudahy Packing Co. v. *Hinkle*, 278 U. S. 460.

Looney v. *Crane & Co.*, 245 U. S. 178.
Air-Way Electric Corporation v. *Day*, 266 U. S. 71.
Hans Rees' Sons, Inc. v. *North Carolina*, 283 U. S. 123.
Fisher's Blend Station v. *Tax Comm.*, 297 U. S. 650.
J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307.
Connecticut General Life Insurance Co. v. *Johnson*, 303 U. S. 77.

Dated, February 19th, 1946.

Respectfully submitted,

EDWARD R. LEWIS,
JOSEPH J. DANIELS,
O. H. MOSIER,
Counsel for Appellant.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OHIO

INTERNATIONAL HARVESTER Co., Appellant,

v.

EVATT, Tax Commr., Appellee

(No. 30316, Decided November 21, 1945)

For the privileges set forth in Section 5495, General Code the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The Treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such

fee is charged and the amount of the fee. (Section 5499, General Code.)

The operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

In computing the numerator of the business-done fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) the value of goods sold during the preceding year in interstate commerce or (b) raw materials shipped from outside the state, whether partially fabricated or not, and used in the manufacturing process during the preceding year. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

The volume of sales during the previous year may be used as indicative of the volume of manufacture carried on in an Ohio factory and as a proper element of comparison with the volume of total business done by a corporation in and out of the state. (Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, approved and followed.)

Where a foreign corporation maintains selling branches and warehouses in this state and all sales proceeds both of cash and notes are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there, the amount of business done in Ohio by such foreign corporation may be measured by the sales made by such selling branches regardless of where products so sold were manufactured or shipped from.

Where a corporation files its annual report with the Department of Taxation and fails to make a claim that it should be required to pay only five-sixths of its annual franchise tax fee by reason of its changing its accounting period from a calendar year to a fiscal year ending October 31, and where upon review under Section 5500, General Code, of the correctness of the determination of the value of its stock, or the proportion of such value as made by the Tax Commissioner, the corporation fails to call to the attention of the Tax Commissioner its claim that by reason of the change of its accounting year from a calendar year

to a fiscal year it should not be charged more than five-sixths of the annual fee, such claim, if any, for reduction is thereby waived. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent upon the value certified by the Tax Commissioner and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation in this state during the preceding year.

Appeal from the Board of Tax Appeals

This is an appeal from decision of the Board of Tax Appeals, under Section 5611-2, General Code. The hearing before the board was upon stipulated facts and evidence.

During the years 1934 to 1939, both inclusive, appellant was a corporation organized under the laws of New Jersey. Its general business and accounting office was located in the city of Chicago, Illinois. Its business consisted of the manufacture of agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof and the sale of such products so manufactured. During the above period appellant owned and operated two factories in Springfield, Ohio, as well as factories in several other states. Throughout the years 1934 and 1935 all products of the appellant's Springfield factories were sold f.o.b. Springfield by the appellant to its subsidiaries, International Harvester Company of America, a Wisconsin corporation, International Harvester Export Company and International Harvester Company of Canada, Limited. During that period all United States sales of appellant's products were made by its subsidiary, International Harvester Company of America. During the years 1936 to 1939, inclusive, appellant marketed its products in this country through dealers located in about 37 states who were independent operators. Appellant's Ohio branches during this period were located at Columbus, Cincinnati, Toledo and Cleveland. Retail stores and motor truck substations were located in fourteen other Ohio cities.

In its Ohio franchise tax returns for the years 1935 to 1940, inclusive, appellant listed the value of the business

done by it in this state during the years preceding the date of the commencement of its several current annual accounting periods at certain figures. Upon the audit of such returns the Tax Commissioner determined an increased value of the business done in Ohio for each of the several years in question. The difference between appellant's returns and the Tax Commissioner's determinations arose from a disagreement between the appellant and Tax Commissioner as to the meaning of the expression "the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period" as used in Section 5498, General Code. The figures listed by the appellant in its 1935 and 1936 returns included sales of products of appellant's Springfield factories made by the Ohio branches and retail stores of International Harvester Company of America, a subsidiary corporation. In its returns for 1937 to 1940, inclusive, appellant's figures included parts sales made at the Springfield factories plus sales of Ohio made products made by its Ohio branches and retail stores operated directly by appellant, commencing in 1936.

The Tax Commissioner used the value of all sales of the preceding year, wherever the products were delivered, as indicative of the value of the business done during the preceding year at the factories, plus the sales by branches, of goods manufactured outside Ohio but sold to Ohio customers.

The pertinent part of Rule No. 275 of the Tax Commissioner, which the Board of Tax Appeals held to be applicable in the present computation, provides as follows:

"In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

In its decision the Board of Tax Appeals stated:

"From a full consideration of the evidence and the stipulations, the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was

sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the Tax Commissioner is modified."

It is contended by appellant that the Board of Tax Appeals erred:

(1) In sustaining the Tax Commissioner in including in the basis of his assessments sales of motor trucks in the years in question where the orders or contracts were solicited and accepted by appellant's branches outside the state of Ohio, and where the trucks were shipped from appellant's Springfield factories on the direction of such branches direct to buyers in other states;

(2) In including in business done in Ohio sales of motor trucks produced at appellant's Springfield factories where the orders or contracts were solicited and accepted by branches of the appellant outside the state of Ohio and the trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the effect of the inclusion of such sales is to tax property and business of the appellant outside the state of Ohio, and, therefore, is invalid under the due process clause of the 14th Amendment to the Constitution of the United States;

(3) In including in business done in Ohio sales of motor trucks produced in appellant's Springfield factories where the orders of contracts were solicited and accepted by branches of the appellant outside Ohio and trucks were shipped by the factory at Springfield direct to buyers in other states on direction of such branches, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States;

(4) In sustaining the tax assessed for ten months' fiscal period ending October 31, 1936, namely, for the period from

January 1 to October 31, 1936, on a full year's basis, whereas such period was only a ten months' period and the tax should have been reduced to five-sixths of the annual tax;

(5) In its decision by making no deduction for the amount of goods sold by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio, while at the same time it included in Ohio business the amount of sales of trucks sold on orders or contracts solicited and accepted by branches of the company outside Ohio when the goods were shipped from the factory at Springfield direct to buyers in other states;

(6) By including in the business done in Ohio, in the basis of its additional franchise tax assessments for the years 1935 and 1936, based on business done and property held, respectively, in the calendar years 1934 and 1935, sales of motor trucks manufactured at appellant's Springfield factories and sold to appellant's subsidiary when the orders for shipment of such goods were sent by branches of appellant's subsidiary outside the state of Ohio to appellant's Springfield factories and when the articles were shipped by the Springfield factories to other branches of appellant's subsidiary outside Ohio or to dealers or consumers residing in states outside Ohio.

O. H. Mosier, of Columbus, and Edward R. Lewis, of Chicago, Ill., for appellant.

Hugh S. Jenkins, attorney general, and Aubrey A. Wendt, of Columbus, for appellee.

TURNER, *J.*:

For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee or tax is based on the proportion of the corporation's property held or used in Ohio and of business done in Ohio by such corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, Gen-

eral Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during such year, wherever transacted. The Tax Commissioner then certifies to the Auditor of State the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the Treasurer of State. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)

This case involves only the method used by the Tax Commissioner to the extent approved by the Board of Tax Appeals for ascertaining the numerator of the business-done part of the formula.

As stated by appellant, a foreign corporation doing business in Ohio, "there is no disagreement between the parties on this appeal as to the total net worth of International Harvester Company to which the Ohio allocation ratio is applied for each year, the amount of appellant's property in Ohio and its total property, and its total business for each of the years involved."

As stated by the Board of Tax Appeals in its journal entry, "consequently, the only matter in dispute is the numerator of the business fraction, which represents the value of the business done by appellant in this state during each of the years involved."

The Tax Commissioner treated the manufacturing done at appellant's factories in Ohio as business done in Ohio. As

indicative of the value of such business done, the Tax Commissioner used the sales value of all appellant's Ohio manufactured products sold in the previous year whether to intrastate or interstate commerce.

As the Board of Tax Appeals reduced the Tax Commissioner's use of appellant's Ohio factories' production by 62 per cent on account of manufactured products shipped from appellant's Ohio factories in each preceding year to warehouses in other states, appellant's complaint is now reduced to the use of 38 per cent of the sales value of the preceding year of products manufactured in Springfield and shipped by the Springfield works during a preceding year direct to buyers in other states, as indicative of the value of business done at appellant's Ohio factories.

It is our opinion that the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522, as stated by Mr. Justice Pitney at page 460 of the case:

"The question is whether an ordinance of the city of St. Louis, levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus intrenching upon the power of the national Congress under Art. 1, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the 14th Amendment."

In commenting on the American Mfg. Co. case, Mr. Justice Roberts said at page 312 in the case of J. D. Adams Mfg. Co. v. Storem, 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct., 913, 117 A. L. R., 429: "The tax on the privilege for the ensuing

year was measured by a percentage of the past year's sales." This is the method followed in the instant case. See, also, Aponaug Mfg. Co. v. Stone, 314 U. S. 577, 86 L. D., 467, 62 S. Ct. 131, affirming the case which arose below in Aponaug Mfg. Co. v. State Tax Commission, 190 Miss., 805, 1 So. (2d) 763; and C. H. Musselman Co. v. Alderson, Tax Commr., 315 U. S. 779, 86 L. Ed. 1187, 62 S. Ct., 580, both decided on authority of American Mfg. Co. v. City of St. Louis, supra.

In coming to its decision in the instant case the Board of Tax Appeals followed the holding of this court in the case of Aluminum Co. of America v. Evatt, Tax Commr., 140 Ohio St., 385, 24 O. O. 405, 45 N. E. (2d), 118, in which we held:

"1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code.)

"2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the foreign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales.

"4. The manufacturing operations within this state by a foreign corporation constitute business done by such corporation in this state within the meaning of Section 5498, General Code.

"5. Tax Commissioner's Rule No. 275 is not unreasonable or unlawful in its application in the instant case. Such rule is favorable to the taxpayer by eliminating from the base upon which the franchise tax is computed goods manufactured in Ohio and sold from warehouses outside of this

state. Such rule eliminates the possibility of double taxation on account of 'business done' by the corporation in the state where sales of Ohio-manufactured goods are made from warehouses in such other state.

"6. In computing the numerator of the 'business done' fraction under Section 5498, General Code, the Tax Commissioner may not be required to deduct therefrom (a) goods sold in interstate commerce, (b) raw materials shipped from outside the state, whether partially fabricated or not, (c) the cost of selling goods manufactured in Ohio but sold outside of Ohio, or (d) administrative expense attributable to sales made outside of Ohio of goods manufactured in Ohio.

"7. A franchise tax computed according to the amount of sales of goods manufactured in Ohio, irrespective of whether such goods are sold within or without the state, in intrastate or interstate commerce, where the payment of the tax is not made a condition of the selling of the goods in interstate or other commerce, but only of continuing in the manufacture of goods within the state, violates neither the commerce clause, Section 8, Article I of the Constitution of the United States, nor the 14th Amendment thereto. (American Mfg. Co. v. City of St. Louis, 250 U. S., 459, followed.)

"8. While a state may not use its taxing power to regulate or burden interstate commerce, on the other hand it is settled by the decisions of the Supreme Court of the United States that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. (Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, followed.)

"9. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing local business, if apportioned to the business done or property owned within the state, is not invalid under the commerce clause of the federal Constitution merely because a part of the property

or capital included in computing the tax is used by the corporation in interstate commerce, or because a part of the manufactured product is thereafter sold and shipped in interstate commerce. (International Shoe Co. v. Shartel, Atty. Genl., 279 U. S., 429, and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S., 284, followed.)

"10. The validity of an excise tax upon a foreign corporation depends upon its operating incidence. The application of Section 5498, General Code, and Tax Commissioner's Rule No. 275 in computing appellant's franchise tax for the year 1939 produced no unlawful result under the evidence in this case."

Appellant in brief and argument attempts to treat the Ohio franchise tax as a sales tax, an income tax or a gross receipts tax, which it is not.

It is the contention of appellant that no portion of the value of the products manufactured in Ohio which were sold in interstate commerce may be considered as a measure of the business done in Ohio. In other words, if all the products of a manufacturing plant in Ohio were sold in interstate commerce in the preceding year it would then follow that the corporation had done no business in Ohio in such factory.

In substance appellant contends that because some of the raw materials used by appellant in its Ohio manufacturing processes during a preceding year came into the state in interstate commerce and some of the finished products of the factories left the state in interstate commerce during a preceding year, the use of the sales value of the finished products of Ohio manufacture as an indication of the value of the business done in Ohio for the preceding year results in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside Ohio in violation of the due process clause of the United States Constitution.

In support of its contentions appellant cites cases decided by the Supreme Court of the United States involving taxes on income and on gross receipts. As these cases have been commented on in the case of Aluminum Co. of America v.

Evatt, Tax Commr., supra, we shall not again review those cases here.

As to the case of International Harvester Co. v. Department of Treasury, 322 U. S. 340, 88 L. Ed., 1313, 64 S. Ct., 1019, cited by appellant, it is only necessary to quote the opening sentence of Mr. Justice Douglas' opinion to wit, "This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 * * * as construed and applied to certain business transactions of appellant companies." We find nothing in that case which would tend to indicate the invalidity of our statutory method of computation of the proportionate value of the issued and outstanding shares of a corporation doing business in Ohio.

This court is committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold.

We are also committed to the proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state.

The present method of determining part of the base upon which to compute the fee, known as the franchise tax, by measuring the volume of business done in Ohio by the value of the sales of the Ohio manufactured products and comparing such result with the total amount of business wherever done computed by the same method, has been in use in Ohio for many years.

On April 15, 1915, the writer, as Attorney General, issued opinion No. 246 (Vol. 1, Opinions of Attorney General (1915), 460 to the Tax Commission of Ohio in the course of which it was said (page 462):

"I am of the opinion that the operation of factories in Ohio by a foreign corporation constitutes 'doing business' in Ohio regardless of where the products of such factory are sold * * * (Citing cases).

"I am of the opinion that under the provisions of Section 5502, General Code, it is the duty of the commission to select some factor or criterion which will represent the volume

of the business done in Ohio as compared with the volume of the business of the company as a whole; and that the business being manufacturing, and all manufacturing being for the purpose of sale, the sales of the products of the factories may be used as such a measure of the volume of the manufacturing business. When so used the sales do not represent commerce at all, but manufacture, and may just as appropriately be used for this purpose as any other criterion, such as the total value of the manufactured articles."

The present formula was spelled out by the General Assembly in 113 Ohio Laws, 637, passed April 6, 1929. Minor amendments were made in 114 Ohio Laws, 762, and 115 Ohio Laws, 589, which latter law became effective July 18, 1933, and is still in force as Section 5498, General Code.

Section 5495 of the General Code of Ohio defines the purpose for which the franchise tax is levied on both domestic and foreign corporations. As to foreign corporations it is provided therein: "* * * and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

Section 5499, General Code, charges a fee of one-tenth of one per cent of the value or the proportionate value of the shares of stock upon which such fee is charged.

Section 5498, General Code, provides the means for determining the value of the outstanding shares of stock of a corporation (domestic or foreign) and prescribes the formula for determining the base upon which the fee provided for in Section 5499 of the General Code shall be computed, to wit: "* * * The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued

and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will. (It is agreed that the computation of the foregoing fraction is correct. The dispute is as to the computation under the second part which follows); take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denomniator is the total value of its business during said year wherever transacted."

Section 5497, General Code, requires every corporation doing business in Ohio to submit to the Department of Taxation certain information including:

"7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

"8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business."

Section 5500, General Code, provides for a review of the correctness of the determination of the value of the stock, or the proportion of such value, as made by the Tax Commissioner under the provisions of the act which we have been discussing. In reading these sections of the statute the following provision of Section 1464, General Code, should be kept in mind:

"Whenever in any law of this state, in effect at, or after the time the Tax Commission of Ohio and the offices of commissioners or members of said commission shall, by the provisions of this act, be abolished, the term 'Tax Commission of Ohio,' 'commission,' 'commissioner,' or 'member,' meaning the Tax Commission of Ohio or the offices of the commissioners or members of said commission, which by this act shall have been abolished, is used, such term shall be construed as referring to the Department of Taxation, the Tax Commissioner, the Board of Tax Appeals, or the members of said Board of Tax Appeals, as the provisions of this act may require."

Appellant also complains of the failure of the Board of Tax Appeals to make a deduction for the amount of goods sold in a preceding year by branches of the company in Ohio when the goods were shipped direct from factories or transfer houses of the company outside Ohio to buyers in Ohio.

We are unable to find any evidence in the record of the amount of any such shipments. The record does contain the following stipulation:

"6. On the sale of goods by a branch, the branch either delivered the article from its own stock in its warehouse at the branch house, or directed that the goods be shipped by the factory direct either to the dealer, or, in a very small percentage of cases, to the user."

The record also contains the following stipulation:

"All sales proceeds, both of cash and of notes, are received by the selling branches and any notes received as part payment are held at the selling branches and interest and principal collected there."

The stipulation of facts discloses, for the several years, the amount of sales by Ohio branches to Ohio buyers, of goods manufactured outside Ohio. In its journal entry the board said: "All orders had to be approved by the respective branches, which collected the purchase price of such sales and deposited the money in local banks, which was

withdrawable only by the general office in Chicago. Appellant's branches would send shipping orders to the factories to ship goods to the branches for storage in warehouses at the branches until they could sell them, or to ship goods direct to the dealers, and in a few instances, direct to the users." Assuming that such distinction in computing the amount of business done in a preceding year is material and assuming further that the record discloses that "in a few instances" shipments from outside the state were shipped direct to users in Ohio on orders from branches in Ohio, we adopt the following reasoning of the board and hold that the decision of the Board of Tax Appeals was not unreasonable or unlawful in respect thereof, to wit:

"All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches. In the case of International Harvester Co. of America v. Kentucky, 234 U. S., 579, 58 L. Ed., 1479, the company claimed that so far as the company's activities in Kentucky were concerned, it was engaged solely in interstate commerce and was, therefore not subject to the jurisdiction of the state. The court held, however, that the continuous solicitation of orders through local agents of the company of goods manufactured outside the state and delivered into the state, the agents having authority to receive money and notes for the purchase price of such goods, constituted doing business in Kentucky. See, also, on this point, International Harvester Co. v. Department of Treasury, 322 U. S., 340, 88 L. Ed., 1313."

Under the Tax Commissioner's Rule No. 275, the Board of Tax Appeals eliminated from consideration 62 per cent of the volume of goods manufactured at appellant's Ohio factories, on the ground that such proportion of appellant's Ohio manufactured products were shipped to warehouses *outside* Ohio. For the governmental protection to appel-

lant's 100 per cent manufacturing operations in Ohio the Department of Taxation has based its computation of the business fraction upon 38 per cent of the business done in Ohio at appellant's factories. By the use of Rule 275, the Board of Tax Appeals made a substantial reduction in the fee to be paid by appellant.

A subsidiary question is set out in appellant's brief. This question was brought about by appellant changing its accounting period from the calendar year to the fiscal year, which appellant claims resulted in assessing a full year's tax for a ten months' period. During the hearing before the board no complaint was made on that score so far as the record discloses. The only mention of such matter in the record is to be found in explanatory notes to appellant's exhibits, to the effect that the company had changed its accounting year to a fiscal year ending October 31. In its application for rehearing by the Board of Tax Appeals appellant states that no consideration was given to the point made in appellant's brief in respect to the fiscal period ended October 31, 1936. An examination of appellant's annual report for 1936 (a part of the period here) filed with the Tax Commission by appellant gives the date of beginning of the current annual accounting period as January 1, 1936. The 1937 report gives the date of the beginning as November 1, 1936 but there is no claim in either report that the company is not liable for the fee for a full year. The record does not disclose that such matter was brought to the attention of the Tax Commissioner upon review under Section 5500, General Code. Therefore such claim, of any, is waived. There is no provision in the statutes for remitting any portion of the fee. The only authority of the Auditor of State is to charge for collection from a corporation doing business in Ohio one-tenth of one per cent on the value certified by the Tax Commissioner (Section 5499, General Code), and there is no authority in the Tax Commissioner to compute the business-done portion of the base otherwise than upon the value of the business done by the corporation during the preceding year. (Section 5498, General Code.)

The form of reports for 1936 does contain the statement: "A corporation which filed its statement for admis-

sion to do business with the Secretary of State of Ohio on or after January 1, 1936, will not be required to file an annual report until 1937." Similarly the 1937 form makes the first filing date after admission as 1938. We hold that the decision of the Board of Tax Appeals is not unreasonable or unlawful in this respect.

As pointed out above, the instant case does not involve a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, *supra,* which we approve and follow here, and in the instant case, we relied upon and now rely upon, ***inter alia,*** American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S. 290, 66 L. Ed. 622, 42 S. Ct. 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U. S. 429, 73 L. Ed. 781, 49 S. Ct. 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S. 284, 71 L. Ed. 1049, 47 S. Ct. 639.

The record in this case discloses no instance of double taxation.

Upon hearing and consideration of the record and evidence in this case we are of the opinion that the decision of the Board of Tax Appeals appealed from is reasonable and lawful and, therefore, that decision should be and hereby is affirmed.

Decision affirmed.

Weygandt, C. J., Zimmerman, Matthias and Hart, JJ., concur.

Bell, J., concurs in paragraphs two, three, four, five and six of the syllabus and in the judgment.

Williams, J., not participating.

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OCT 21 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S BRIEF.

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ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S BRIEF.

The case below is reported in 146 Ohio State 58; 64 N. E. (2d) 53.

Grounds on Which the Jurisdiction of this Court Is Invoked.

The jurisdiction of this Court is invoked on the ground that the judgment of the Supreme Court of Ohio appealed from sustained Ohio corporate franchise taxes against the Appellant which (1) deny the Appellant due process of law under the Fourteenth Amendment to the Federal Constitution, and (2) are taxes on transactions in interstate commerce in violation of the commerce clause of the Federal Constitution.

Concise Statement of the Case.

This appeal involves the validity of Ohio foreign corporation franchise taxes assessed against International Harvester Company, a New Jersey corporation, for the years 1937 to 1940 inclusive, based in the case of each year on the property held and business done by International Harvester Company in the preceding year.

The tax is imposed by Sections 5495 to 5499 inclusive of the General Code of Ohio, set forth in Appendix A hereto. Section 5495 provides for an annual fee or franchise tax levied on each foreign corporation "for the privilege of doing business in this State." The tax is based on a two-way apportionment of the value of the total issued and outstanding capital stock of the corporation determined as provided in Section 5498. That Section in effect imposes two franchise taxes separately arrived at. There is one tax on such proportion of one-half of the total capital stock value as is allocated to Ohio upon the ratio of Ohio property to total property, and there is a second franchise tax on such proportion of one-half the total capital stock value as is allocated to Ohio upon the ratio of business done in Ohio to total business done.

Section 5498 provides that after finding the total value of the issued and outstanding shares of stock of a foreign corporation, the Commissioner shall proceed as follows:

> "Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio, and whose denominator is the fair value of all its property wheresoever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the cor-

poration in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

The combined amounts are subjected to an annual fee of 1/10th of 1% by Section 5499.

The Ohio franchise tax is not a tax in lieu of a property tax, but is an additional tax. The Ohio statute provides for the taxation of real estate and personal property, and Appellant's property in the state was, of course, subject to such general taxation (Section 5328, General Code of Ohio).

There is no dispute as to the total value of Appellant's outstanding and issued capital stock. There is no dispute as to the amount or value of Appellant's property in Ohio or the value of its total property, on the basis of which one of the two taxes imposed by the Ohio franchise tax Act is assessed. The sole question in dispute relates to the method employed by the Tax Commissioner in determining the other franchise tax based on an allocation and division of the Company's total annual business into (1) business done in Ohio, and (2) business done outside of Ohio.

International Harvester Company is a corporation of the State of New Jersey, with general business and accounting offices located in the City of Chicago, Illinois. It is engaged in the business of the manufacture and sale of agricultural implements and machines, tractors, motor trucks, binder twine and similar commodities and parts thereof (R. 56).

During the years 1936 to 1939 it operated four factories in Chicago as well as factories in Auburn, N. Y., Milwaukee, Wis., Chattanooga, Tenn., Canton, Rock Falls, Rock

Island and East Moline, Illinois, New Orleans, La., two factories in Springfield, Ohio, factories at Fort Wayne and Richmond, Indiana, and also for part of such period a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (R. 56).

Appellant operated in the years 1936 to 1939 more than 100 selling branches in the United States, selling its products to dealers and users. The Ohio branches in 1936 to 1939 were located at Columbus, Cincinnati, Toledo and Cleveland (R. 57).

On sales in the United States, shipment of motor trucks from the Springfield plant was made on orders of the branches, partly by rail shipment from the factory to the branches or directly to the dealers, but chiefly by drive-away by independent contract carriers from the factory to the branch or to the dealer, or by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory directly to the consumer, or delivery was made at the factory to the consumer who drove his own truck away (R. 60). Except for a small amount of sales of miscellaneous castings and repair parts made by the factory, all sales of Appellant's products in the United States to dealers and consumers were made on orders solicited by representatives of the selling branch in whose territory the buyers were located, or on orders received by mail by the selling branch. All orders and contracts for the sale of goods were accepted by the Branch Manager of the branch in whose territory the buyers were located. The sale proceeds, cash and notes, for all products sold by a branch were received by the selling branch and principal and interest on the notes were collected by the branch making the sale (R. 59).

In the case of sales to subsidiary companies or to job-

bers in foreign countries, the shipping instructions to the factory were issued by the general office in Chicago (R. 59).

The function of the factory in all these sales, except the small amount of retail sales of castings and repair parts above referred to, is limited to the manufacture of the goods and their shipment as directed as above described (R. 59).

A. L. Vierling, Works Auditor of the Springfield Plant, testified that on the shipment of a motor truck to a dealer, on instructions received from the branch making the sale, the Springfield Plant made no sale invoice to the dealer but merely a property invoice describing the property shipped. He stated: "No dollars or cents are shown on the invoice. We are not interested in dollars and cents in the plant. We have nothing to do with dollars and cents in the plant" (R. 49). The witness also testified that no salesmen are employed or sent out by the Springfield Plant and that the Springfield Plant has no warehouse (R. 46-47).

The disputed amount of taxes involved in this appeal results from the inclusion in the numerator of the statutory "business done" fraction, as business done in Ohio, of gross receipts from sales of motor trucks assembled at the Appellant's factory in Springfield, Ohio, sold by Appellant's branches located outside of Ohio all over the United States on contracts solicited and accepted by said branches, and shipped direct from the factory at Springfield, Ohio, to purchasers located in states outside Ohio in the territory of such branches.

The Appellant had included in its tax returns, as business done in Ohio, all sales of its products, wherever manufactured, by its Ohio branches to Ohio customers. Thereby it included in business done in Ohio, all sales by the Ohio

branches where the sales were solicited or secured by the Ohio branches from Ohio customers for products made at Appellant's factories outside Ohio and shipped by the factory manufacturing them direct to the Ohio customers pursuant to the direction of the Ohio branch which made the sale and which kept all the records of the sale and collected the purchase price (R. 30, 69).

But the Ohio Tax Commissioner and the Ohio Board of Tax Appeals, in determining the assessments, *also* included, in business done in Ohio, sales where the situation was exactly reversed, that is, sales where nothing happened in Ohio except the manufacture or assembly of motor trucks at Appellant's plant in Springfield, Ohio, and the shipment of such trucks from the Springfield Plant direct to customers outside of Ohio (R. 71, 72, 74). The directions to make such shipments were sent to the Springfield Plant by the Company's branches outside Ohio, which had obtained and accepted the customers' orders, kept all the accounts, and received the sales proceeds.

This results in a treatment of sales made by branches outside Ohio to purchasers outside Ohio of goods manufactured in Ohio which is utterly inconsistent with the treatment of sales made by Ohio branches to Ohio purchasers of goods manufactured outside Ohio. The sale of a truck manufactured in Ohio is considered Ohio business where the sale was made by an outside branch to an outside buyer and the truck was shipped direct from the factory in Ohio to the buyer outside Ohio; and, inconsistently, the sale of an article manufactured in Indiana, for example, sold by an Ohio branch to an Ohio buyer and shipped direct from the Indiana factory to the Ohio buyer, is also considered as Ohio business.

The Ohio Tax Commissioner had included as business done in Ohio the sales of the entire output of the Spring-

field plant. Thirty-eight per cent (38%) in dollar volume of sales of all trucks shipped from the Springfield plant to points in the United States outside of Ohio, represented sales of motor trucks to buyers outside of Ohio, shipped on the instructions of the Company's branches outside of Ohio, which had obtained the orders and handled the transactions throughout (R. 20, 79; Ex. 5, R. 46, 53).

The Board of Tax Appeals modified the assessments of the Tax Commissioner by excluding from Ohio business sales of Springfield-manufactured motor trucks sold by branches of Appellant outside of Ohio to buyers outside Ohio and delivered to such buyers from the warehouse stocks maintained at such branches (R. 79). Such excluded sales amounted to 62% of the shipments of motor trucks from the Springfield plant to United States destinations. But the Board sustained so much of the Commissioner's assessments as resulted from including in "Ohio sales" or in Ohio "business done" sales of Springfield-manufactured motor trucks sold by branches *outside* of Ohio to customers *outside* Ohio and shipped direct from the Springfield plant to such buyers in states *outside* of Ohio. Such included sales amounted to said 38% of the shipments from the Springfield plant to points in the United States outside Ohio. This was done pursuant to Rule No. 275 of the Tax Commissioner, adopted October 13, 1939, which provides:

> "Rule No. 275. Business done in and out of Ohio—Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> "All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

"The denominator of such business fraction shall in all cases be the total sales wherever made." (R. 64).

Appellant appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio, which affirmed the decision of the Board of Tax Appeals.

This appeal is limited to the franchise taxes for the years 1937 to 1940, inclusive. The increased amounts of additional franchise taxes under the modified assessments of the Tax Commissioner for those years, as approved by the Supreme Court of Ohio, resulting from the inconsistency in the interpretation of what is Ohio business and the inclusion of the 38% of outside-Ohio sales as "business done" in Ohio, are not minuscule. Taking the year 1939, for example, the amount of tax based solely on the factor of business done would be $21,132.67, which is an increase of $10,023.76 resulting from the inclusion of the 38% of sales made outside Ohio of Springfield-manufactured trucks, over the tax of $11,108.91 computed by omitting such 38% of sales. (See foot-note on pp. 20-21 for computations.) The annual tax owing upon the property factor, about which there is no dispute, is of course in addition to the tax upon the "business done" factor.

The 38% of such out-of-state sales are subject to franchise taxes in 9 states outside Ohio and to net income taxes in 32 states outside Ohio and the District of Columbia (R. 20-23) and also to sales and gross receipts taxes imposed by numerous states outside Ohio.

In this appeal the questions raised are whether the use of such 38% of sales made outside Ohio of Springfield-manufactured trucks as a measure of the Ohio franchise taxes assessed against Appellant denies Appellant due process of law under the Fourteenth Amendment to the Federal Constitution or is an imposition of tax upon transactions in interstate commerce in violation of the commerce clause of the Federal Constitution.

Specification of Assigned Errors Intended to be Urged.

Appellant urges the following errors, assigned in its Assignment of Errors (R. 2):

"1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

"2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States."

SUMMARY OF ARGUMENT.

The inclusion in the numerator of the "business done" fraction of the 38% of sales outside Ohio of Springfield-manufactured trucks not only taxes property and business of the Appellant outside the State of Ohio, in contravention of the due process clause of the Fourteenth Amendment, but also lays a multiple burden on transactions in interstate commerce, in violation of the Commerce Clause of the Federal Constitution.

Denial of Due Process.

From beginning to end all sales in this 38% category were handled by branches outside Ohio. The Springfield plant has no warehouse; and as soon as a truck is completed, it is shipped out. Essentially, therefore, sales in this 38% category partake no more of the nature of an Ohio sale than sales in which a branch outside Ohio delivers a truck to the buyer out of its warehouse stock. How can a sale handled from beginning to end by a branch outside Ohio be an "Ohio sale" or a sale made from an Ohio "warehouse" when Appellant has no warehouse at Springfield and all that the Springfield factory does is to ship the truck, when completed, direct to the out-of-state buyer at the direction of the outside branch?

Obviously sales in this 38% category are identical with the Class E sales which this Court held in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340, were subject to the Indiana gross income tax; that is, were subject to sales and gross receipts taxes by the state where the buyer and the selling branch are located. A

sale cannot be an Indiana sale subject to the Indiana gross income tax, and at the same time be Ohio "business done" under the Ohio franchise tax.

Sales in this 38% category not only may be subjected to gross receipts and sales taxes when made in any of the states which has such a tax but also are subject to state income taxes in thirty-two states and the District of Columbia and to corporate franchise taxes in nine states, when made in any state having an income or franchise tax. The very fact that each of these states treats the sales in this 38% category (which Ohio has held to be Ohio "business done") as sales in their respective taxing jurisdictions is striking proof that the capital stock value created by such sales has a situs outside Ohio, and that for Ohio to include them as Ohio "business done" is to tax extra-territorial values arising and situated outside of Ohio.

This taxing of extra-territorial values is accomplished in the instant case by an illogical and inconsistent use of the words "business done" as meaning, in the case of Ohio business, both *sales* by Ohio branches and Ohio *manufacturing activity*, and as meaning, in the case of business done everywhere, *merely* sales made everywhere. Either the fraction should be Ohio sales divided by total sales, or (if manufacturing activity is to be included) Ohio sales plus Ohio manufacturing activity divided by total sales plus total manufacturing activity. If the Ohio method of determining the numerator of the "business done" fraction is approved, every state in which Appellant manufactures can adopt it, with the inevitable result that the total of the numerators in the fractions will be substantially larger than the denominator—that is, the combined fractions will represent substantially *more* than all business done everywhere by Appellant.

Sales by Ohio branches of goods manufactured by Appel-

lant outside Ohio, and shipped by the factories outside Ohio, on direction of the Ohio branches, direct to the buyers in Ohio were included by the Tax Commissioner in the numerator of the "business done" fraction. This was proper, under *International Harvester Company* v. *Department of Treasury, supra.* But Ohio seeks to seize the business both ways, by including also sales of Springfield trucks when sold by branches outside Ohio and shipped by the Springfield plant direct to buyers in other states. This glaring inconsistency strikingly shows the arbitrary character of the Tax Commissioner's method in arriving at the numerator of the "business done" fraction.

The decisive opinion of this Court in the case of *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U. S. 123, holds that the use of an arbitrary allocation formula, which results in allocating an excessive net income to the taxing state, will not be permitted because the state is attempting to tax extra-territorial business and property. The same principle was applied to a tax on the entire capital stock value in *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, and in *Looney* v. *Crane Co.,* 245 U. S. 178. See also *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71. The tax assessments in question are therefore invalid because they tax capital stock values arising and situated outside of Ohio, and hence deny due process of law under the Fourteenth Amendment.

Violation of the Commerce Clause.

The sales in the 38% category are either (1) sales in inter-state commerce or (2) extra-state sales. If they are extra-state sales, Ohio has no jurisdiction under the due process clause to use them as a measure of Ohio franchise tax value. If they are sales in interstate commerce, they cannot be used as a measure of Ohio franchise tax value

for the further reason that when so used, a multiple burden is laid on interstate commerce.

The Ohio franchise tax is really two taxes. One tax, which is laid on one-half the capital stock value in the ratio of Ohio property to total property, has nothing to do with the other tax, which is laid on one-half the capital stock value in the ratio of Ohio business to total business. The first tax is not here involved; the second is. An increase in "business done" in Ohio directly and necessarily results in an increase of the Ohio franchise tax. Accordingly, it inevitably follows that to include gross receipts in interstate commerce in the numerator of the "business done" fraction is to lay a forbidden burden on interstate commerce.

The conclusive reason why the inclusion of the 38% of sales as Ohio business lays a prohibited multiple burden on interstate commerce is found in the indisputable facts: (1) that these very same sales are subject to a gross income or sales tax, in every state which has such a tax, under the decision of this Court in *International Harvester Company v. Department of Treasury*, 322 U. S. 340 (Indiana, for example, is already imposing its gross income tax upon this class of sales which has been held by the Court below to be Ohio "business done") and (2) that such sales are subjected to franchise taxes in nine states and to net income taxes in thirty-two states and the District of Columbia (R. 20-23). Thus we have an *actual* (not merely a threatened) multiple burden on every one of the sales in this 38% category which is consummated by delivery of a product from the Springfield factory to a buyer in one of the taxing jurisdictions having one of such types of tax.

The Ohio franchise tax on "business done" is not a manufacturers' excise tax on the manufacturing activity as such, and therefore the case of *American Manufacturing*

Co. v. *St. Louis,* 250 U. S. 469, relied on by the Ohio Supreme Court in its opinion in the instant case, is not apposite. The Ohio tax is a tax on "the privilege of doing business" *as a foreign corporation* in Ohio in any form. If it were a manufacturers' excise tax on the manufacturing activity as such, it would have to apply to manufacturing activities whether conducted by a corporation, a firm or an individual, as did the tax in the *American Manufacturing Company* case. But this Ohio tax falls only on corporations, for the privilege of exercising their corporate functions within the state.

A manufacturers' excise tax, such as that in the *American Mfg. Co.* case, can be imposed but once, by the state of manufacture only, and there is no possibility of the multiple imposition of such a tax. A corporate franchise tax may be imposed in every state in which the corporation does business and may result in multiple burdens on interstate commerce which are not borne by intrastate commerce. The vice of the Ohio franchise tax is that it actually results in multiple taxation of interstate transactions.

The elements which constitute the manufacturing activity enter completely into the measure of the Ohio franchise tax. Under the property fraction (not here in dispute) Ohio measures a tax on one-half the capital stock value in the ratio of Ohio property to total property. The Springfield plant, land, machinery and equipment, within and by means of which the manufacturing activity is carried on, are necessarily a fair measure of the Ohio manufacturing activity.

The most cogent proof that Ohio is not attempting to reach the manufacturing activity as such is the exclusion, from the numerator of the "business done" fraction, of sales of Springfield trucks sold off the branch house floors in other states. The Ohio manufacturing activity obviously

is the same whether the truck is shipped direct from the Springfield plant to the buyer, or whether it is shipped first to the out-of-state branch and later sold off the branch warehouse floor. But the Board of Tax Appeals, with the approval of the Supreme Court of Ohio, has excluded sales off the branch warehouse floors.

Further, and equally conclusive of the soundness of our contention that the Ohio franchise tax is not a tax on the manufacturing activity as such, is the fact that goods not of Ohio manufacture *are included* in Ohio business when sold by Ohio branches to Ohio buyers, whether delivered off the Ohio branch house floors or shipped direct from the factories outside of Ohio to the Ohio buyers. There was of course no Ohio manufacturing activity in the case of such sales, yet they are included in the numerator of the "business done" fraction.

It is therefore impossible to say that Ohio is seeking to reach the manufacturing activity as such, and the tax cannot be sustained by such an argument. As construed and applied by the Ohio taxing authorities under Rule No. 275 and by the Ohio Supreme Court, the tax manifestly goes beyond the permissible bounds of exacting a fee for the privilege of doing business in Ohio and seeks to measure the fee by interstate transactions and thereby to levy a tax which constitutes a multiple burden on interstate transactions forbidden by the commerce clause.

ARGUMENT.

The Decision Below Denies Appellant Due Process of Law Under the Fourteenth Amendment.

In its decision in this cause, the Supreme Court of Ohio has upheld the inclusion, in the numerator of the "business done" fraction of the Ohio franchise tax formula, of sales made by selling branches outside Ohio of motor trucks produced at the Springfield plant of the Appellant, that is, sales where the orders or contracts were solicited and accepted by the selling branches outside of Ohio, and the trucks were shipped by the factory at Springfield on instructions of the selling branches in other states direct from the factory to the buyers in other states, and the branches outside of Ohio received the sales proceeds, and collected the notes given in payment when they became due.

These sales made outside Ohio were 38% of all shipments from the Springfield plant to points in the United States outside Ohio. Such 38% of sales was included as "Ohio sales" under the Ohio Tax Commissioner's Rule No. 275 which arbitrarily, and therefore unconstitutionally, provides:

> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

It is an anomaly to say that the 38% of sales made outside Ohio are "Ohio sales." The Springfield plant has no salesmen and has nothing to do with handling sales orders. When the Springfield plant ships a truck, it makes out a property invoice which it sends to the branch making

the sale, on which invoice no dollars or cents are shown. It was testified that the plant "is not interested in" and has "nothing to do with dollars and cents" (R. 49).

The factory at Springfield is merely a factory and a shipping point; indeed, it is largely an assembly plant (R. 60). The Springfield plant has no warehouse whatever. As soon as a truck is completed it is shipped out and must be shipped out, for there is no room for it at the plant (R. 47). Every essential step in the sale except the shipment of the truck is done outside of Ohio, and the shipment itself is made on the direction of the branch outside Ohio. The business is handled in exactly the same way whether delivery is made from the out-of-state branch warehouse or the branch instructs the factory to ship the truck direct to the buyer. In each case the outside branch accepts the order and receives the proceeds. In one case it delivers the truck from the branch house floor. In the other case, it directs the Springfield plant to ship the truck to the buyer. The Ohio Board of Tax Appeals and the Ohio Supreme Court both held that the sales completed by delivery from the branch warehouses outside Ohio were not "Ohio sales" or "business done" in Ohio. The same holding should have been made in respect to the out-of-state sales completed by shipment from the Springfield plant.

The sales in this 38% category are the same as the Class E sales which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, subject to the Indiana gross income tax. In that case the goods were manufactured outside Indiana and shipped direct to the buyer in Indiana on the direction of the branch in Indiana which accepted the sale contract. We submit that it is impossible for the same sale to be an Indiana sale under the Class E

category in the above case, and also an Ohio sale for the purposes of the Ohio franchise tax. Yet that is exactly what the Ohio Tax Commissioner's inclusion of these sales as Ohio sales comes to.

Rule 275 of the Ohio Tax Commissioner is squarely in conflict with the decision of this Court in the Indiana gross income tax case. The Rule states " • • • all sales of goods manufactured in Ohio wherever sold, shall be considered as Ohio sales • • •". This Court held in the Indiana case that the 38% of sales here involved were local sales in the state where the sales branch and the buyer are located. The Ohio Tax Commissioner and the Ohio courts say that the 38% of sales are Ohio sales.

If the 38% of sales are not Ohio sales but sales of the states where the branches and buyers are located, as this Court decided in the Indiana case, it would follow that the Ohio tax is measured by extra-territorial values and that there is a denial of due process of law under the Fourteenth Amendment.

The taxing of extra-territorial values is accomplished in the instant case by the illogical interpretation of the statutory words "business done" as meaning in the case of business done in Ohio *both* Ohio sales and Ohio manufacturing activity and as meaning in the case of total business done everywhere *only sales* everywhere. The same statutory words "business done" are given a double meaning as respects Ohio business, but only a single meaning as respects business everywhere. In order to satisfy the requirements of due process the concept of "business done" must be identical in the numerator and in the denominator the "business done" fraction. If both Ohio sales and Ohio-made goods are to be included in the numerator, then both sales everywhere and goods made everywhere should be included in the denominator.

However, since the formula adopted by the Ohio Tax Commissioner and by the Courts below uses sales everywhere as the *sole* element in the denominator, it follows that the numerator must necessarily consist *only* of sales in Ohio. The use of a "business done" fraction with such a correlated numerator and denominator would avoid measuring the tax by extra-territorial values and would be consistent with the requirements of due process under the decisions of this Court.

This question of constitutionality is brought into glaring focus by the utterly inconsistent position of the Ohio tax authorities and the courts below in using as the measure of the tax sales by Ohio branches of goods shipped from factories and warehouses outside Ohio direct to the buyers in Ohio, and yet at the same time, as brought out above, including sales by branches outside of Ohio of trucks produced at the Springfield plant, when the trucks were shipped direct from the Springfield factories to buyers in other states.

The undisputed evidence showed that in determining Ohio business no deduction had been made of sales by Ohio branches, where the goods were shipped from places of business of the Appellant outside Ohio direct to the buyers in Ohio (R. 20, 71-72).

We submit that there is no possible basis for defending the inconsistency in including in Ohio business the 38% of sales by branches outside of Ohio, where the trucks were shipped from the Ohio plant to out-of-state buyers, and at the same time including sales by Ohio branches where the goods were shipped to Ohio buyers from factories or warehouses of the Appellant outside of Ohio. To include both classes of sales in Ohio business must necessarily be to include one class of sales which does not constitute business done in Ohio, and therefore to tax property and business outside the jurisdiction of Ohio, and consequently

to deny due process of law under the Fourteenth Amendment.

We agree that sales by Ohio branches to Ohio buyers of goods manufactured outside of Ohio, which were shipped direct from factories or warehouses outside of Ohio to the buyers in Ohio, may properly be considered Ohio business. Appellant included such sales as Ohio business on its returns. But if such sales are Ohio business, then inescapably sales by branches outside Ohio of Springfield motor trucks shipped direct from the Springfield factory to buyers in other States are not Ohio business. *International Harvester Company, et al.* v. *Department of Treasury, et al., supra.*

The result of including the 38% of out-of-state sales in Ohio business is a distorted formula, which inevitably allocates to Ohio a disproportionate and arbitrary percentage of Appellant's capital stock value.

Although the amount of Ohio business done was materially reduced by the Ohio Board of Tax Appeals from the figure found by the Tax Commissioner by excluding the 62% of sales by branches outside of Ohio off their own warehouse floors, nevertheless there still remains in Ohio business, taking the year 1939 as an example, the amount of $11,578,844, representing the 38% of Springfield trucks sold by branches outside of Ohio which were delivered by shipment direct from the factory to buyers in other States (R. 37-39, Appellee's Ex. A, R. 28, 90).

If this 38% of sales outside Ohio is excluded from Ohio business, making the numerator $12,832,674, the resulting Ohio franchise tax on the "business done" fraction would be $11,108.91.[1]

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[1]Tax on Business Done Fraction by excluding the 38% of sales from "business done" in Ohio:

$12,832,674 (Ohio business done) divided by $213,001,465 (to-

If the 38% of sales outside Ohio is included as Ohio business, making the numerator $24,411,518.00, the resulting tax on the "business done" fraction would be $21,132.67.[2]

Thus the illegal method approved by the Supreme Court of Ohio practically doubles the tax on the "business done" fraction.

This Court held in its decisive opinion in the case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, that the North Carolina income tax on Hans Rees' Sons,

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tal business done) multiplied by $184,392,489 (one-half of capital stock value) multiplied by 1/10% equals $11,108.91 of tax.

$12,832,674 Ohio business is made up as follows:

$ 8,125,736	Ohio business per Appellant's original Franchise Tax Returns, consisting of sales of Ohio branches to Ohio buyers, plus Springfield manufactured castings and parts sold direct to customers (R. 69).
$ 4,706,938	Sales of Springfield trucks to subsidiaries. (Appellee's Ex. A, R. 28, 90).
$12,832,674	

[2]Tax on Business Done Fraction under decision of Supreme Court of Ohio, *i.e.* including the 38% of sales:

$24,411,518 (Ohio business) divided by $213,001,465 (total business done) multiplied by $184,392,489 (one-half of capital stock value) multiplied by 1/10% equals $21,132.67 of tax.

$24,411,518 Ohio business is made up as follows:

$ 8,125,736	Ohio business per Appellant's return (R. 69).
4,706,938	Sales of Springfield trucks to subsidiaries (R. 90).
11,578,844	Sales by branches outside Ohio of Springfield trucks shipped direct from the Springfield plant to dealers and users outside Ohio, *i. e.*, the 38% of sales.
$24,411,518	

The amount of $11,578,844 is arrived at by deducting $1,858,184 sales of Springfield trucks by Ohio branches (R. 69) from $32,328,826 total sales of Springfield trucks to dealers and users in the United States (Appellee's Exhibit A, R. 28, 90) and taking 38% of the balance of $30,470,642.

Inc., a New York corporation, denied due process of law under the Fourteenth Amendment because it allocated to North Carolina an excessive and arbitrary amount of the corporation's total net income. The total net income was allocated to North Carolina solely on the ratio of tangible property in North Carolina to total tangible property. This Court held that the North Carolina formula as applied to Hans Rees' Sons, Inc. was unreasonable and arbitrary in that it attributed to North Carolina a percentage of income "out of all appropriate proportion to the business transacted by the Appellant in that State." This Court said that where a corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the federal due process clause "be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State" (p. 133).

In the Ohio franchise tax assessments involved in this appeal one tax on one-half of the entire capital stock value is measured solely by the percentage of business done in Ohio. Almost half of the total Ohio business used in the assessment consists of sales made outside of Ohio which are subject to sales and gross receipts taxes, and are actually used as the measure of income and franchise taxes, in many States outside of Ohio.

The use of an arbitrary allocation formula which results in attributing an excessive tax value to the taxing state, as in the *Hans Rees'* case and in this case, is invalid as an attempt by the State to tax extra-territorial values and a denial of due process of law, upon the same grounds that the attempt to tax the full value of the entire capital stock value of the foreign corporation was condemned in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, and *Looney* v. *Crane Co.*, 245 U. S. 178, and upon the same grounds that the at-

tempt to fix an arbitrary value of $100.00 per share on no par capital stock actually worth only $7.00 per share (notwithstanding the application of a fair allocation formula to such arbitrary value) was condemned in *Air-way Electric Corporation v. Day*, 266 U. S. 71.

Unlike the Texas franchise tax upheld in *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, which was measured solely by receipts from local intrastate sales to Texas buyers, Ohio here uses extra-state sales as a measure of the tax on one-half of the capital stock value. No decision of this Court to date has given validity to that basis of tax, and the Court has expressed the view that extra-state values may not be so utilized as to attribute an excessive proportion of the corporate stock or net worth or income to the taxing State.

The simple fact that this 38% of sales is subject to sales and gross receipts taxes in all states outside Ohio where the selling branches and buyers are located and is used as the measure of franchise taxes in 9 states outside Ohio and as the measure of net income taxes in 32 states outside Ohio and in the District of Columbia, is proof enough that these sales are not "Ohio sales" or Ohio "business done", but are "sales outside Ohio" and "business done" outside Ohio which should be excluded in computing the Ohio franchise tax.

If the Ohio method of determining the numerator of the "business done" fraction is approved, every state in which Appellant manufactures can adopt it, with the inevitable result that the total of the numerators in the fractions will be substantially larger than the denominator, that is, the combined fractions will represent substantially *more* than all business done everywhere by Appellant, and the total stock value taxed would be greatly in excess of the actual total value.

This is strikingly evident if we assume that a corporation did its business only in two states, *viz.*: Ohio, where all its manufacturing was done, and Indiana, where all its selling branches were located and all its selling operations carried on, and that each state had a tax identical with the Ohio "business done" tax.

If the factory in Ohio shipped the goods direct to the buyers in Indiana on sales made by the branches in Indiana, then on the "business done" fraction Ohio would tax the entire capital stock value based on "business done", since all the sales would be called Ohio business.

But Indiana would also tax the entire capital stock value based on business done, since Indiana would say that the sales were all made in Indiana, and were therefore Indiana business.

It follows that the capital stock value based on "business done" would be taxed fully twice.

Both in theory and in practice, therefore, the Ohio exaction arbitrarily taxes extra-territorial values and is a denial of due process of law.

The Decision Below Imposes a Burden on Interstate Commerce In Violation of the Commerce Clause of the Federal Constitution.

The assessments challenged in this appeal result from including in "Ohio sales" or Ohio "business done" the 38% of sales of motor trucks produced at Springfield, Ohio, sold by branches located outside Ohio all over the United States and shipped on instructions of those branches direct from Springfield to the buyers in States other than Ohio. These sales are either sales in interstate commerce, or they are extra-state sales.

If they are extra-state sales, we have demonstrated be-

yond question that Ohio has no jurisdiction to tax such sales or to use them as a measure of a tax, under the due process clause of the Fourteenth Amendment.

If they are interstate commerce sales, we submit that to use them as a measure is not only to deny due process but to lay a multiple burden on interstate commerce in violation of the Commerce Clause.

The Ohio franchise tax is really two taxes. There is one tax on one-half of the capital stock value based on the property fraction. It has nothing to do with the other tax, which is a tax on one-half of the capital stock value based on the "business done" fraction. As either fraction goes up or down, the tax under that fraction is separately and independently affected. Therefore, an increase in Ohio "business done" directly and necessarily results in an increase of the Ohio franchise tax. Accordingly, it follows ineluctably that to measure one of the two taxes by using in the numerator of the fraction gross receipts from sales made in interstate commerce is to lay a direct and immediate burden on interstate commerce.

It is true that in *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, which was followed by *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, the Illinois franchise tax was upheld when there was included in Illinois business sales by the taxpayers of goods manufactured in Illinois where the orders were accepted in Illinois and the goods were shipped from the Illinois factories direct to buyers in other States. In the Illinois tax, there was a unitary formula allocating a percentage of corporate value to Illinois by dividing the sum of Illinois business and property by the sum of total business and property. This Court said in the latter case that while the sales were in interstate commerce, they did not *directly* affect the taxes since, as the amount of property in Illinois might go down while the sales in

Illinois were increasing, the "exaction may rise while the sales to customers outside Illinois decline, and may fall while such sales increase." (p. 514.)

The decisions in those cases are clearly distinguishable because, in the first place, all of the important sales, manufacturing and business activities and all property of the taxpayers in the *Hump Hair Pin* and *Western Cartridge* cases were found in Illinois. In those cases the goods were made in Illinois, the contracts were accepted in Illinois, the offices handling the business were located in Illinois, and the proceeds were received in Illinois; the only activity outside of Illinois was the solicitation made by travelling salesmen; and no state except Illinois had any basis for imposing any kind of direct or indirect taxes on those taxpayers. That situation does not exist in the instant case.

Secondly, as the Ohio franchise tax is really two taxes, if the amount of Ohio business increases, the separate tax measured thereby increases. This Court said in the *Hump Hair Pin* and *Western Cartridge* cases that the effect of including interstate sales in the Illinois business was *remote* and *indefinite* and might not increase the tax at all. On the other hand, the effect of including the 38% of sales in question in Ohio "business done" is definite and immediate and almost doubles the tax. The property fraction does not affect the tax under the "business done" fraction, and the tax under the "business done" fraction does not affect the tax under the property fraction. Accordingly, we submit that under the very distinction made in the *Hump Hair Pin* and *Western Cartridge* cases, the inclusion of the 38% of sales as Ohio "business done" lays a *direct* and *immediate* burden on interstate commerce.

But the vital and compelling reason why the inclusion of the 38% of sales as Ohio business results in laying a prohibited multiple burden on interstate commerce is that the

very same sales are directly taxed or are used as the measure of a tax in many states where the Appellant has its branch houses.

The Supreme Court of Ohio states: "The record in this case discloses no instance of double taxation." (R. 119.) We think this is surprising, in view of the fact that the record shows that the Appellant does business in 9 states which have franchise taxes, and in 32 states and the District of Columbia which have income taxes, and that in every one of those states the Appellant makes its franchise and income tax returns, and reports as sales or gross receipts in the taxing state the sales made by the branches in that state, without excluding sales of goods manufactured outside of the state of the selling branch (R. 22, 23, 42). It is even more surprising in view of the decision of this Court in *International Harvester Company* v. *Department of Treasury, supra,* which upheld the imposition of sales and gross receipts taxes by a state in which both the sales branch and the buyer are located.

In 1939, for example, $11,578,844 of sales consisted of sales of motor trucks produced at the Springfield plant on contracts solicited, obtained and accepted by Appellant through its branches in other states with delivery of the trucks made by shipment from the Springfield plant direct to the buyers in other states. Accordingly, so much of the above sales of $11,578,844 as were sales made by branch houses in the 9 franchise tax states and in the 32 income tax states and the District of Columbia where the Appellant does business, were used as a measure not only under the contested Ohio franchise tax assessments, but were also used as the measure of franchise and income taxes in other taxing jurisdictions, and are liable for direct sales and gross receipts taxes in states outside Ohio imposing such direct taxes. A direct gross receipts tax on the Indi-

ana portion of such sales was upheld in *International Harvester Company* v. *Department of Treasury, supra,* thereby permitting all such sales to be subjected to direct sales and gross receipts taxes in states other than Ohio.

The Ohio Supreme Court was clearly in error in this case in its failure to recognize the development of the law made by this Court in *International Harvester Company* v. *Department of Treasury, supra,* a decision that overruled the Court's long-standing pronouncement made in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. The Ohio Court decided the instant case upon the authority of its prior decision handed down in 1942 in *Aluminum Company of America* v. *Evatt, Tax Commissioner,* 140 Ohio State 385, 45 N. E. (2nd) 118, in which it said:

> "If Ohio-manufactured goods are shipped to a warehouse in another state where the sale thereof would constitute doing business within such state, the Commissioner's rule eliminates the value of such goods from consideration. There is therefore no opportunity for double taxation, as *goods which do not come to rest before sale do not lose their character of interstate commerce in the state of delivery.*" (Italics supplied.)

But this Court in 1944 in *International Harvester Company, et al.* v. *Department of Treasury, et al., supra,* repudiated the theory that the sale of goods, coming into a state in fulfillment of a contract of sale made between a local seller and a local buyer, could not be taxed in such state of destination. That case held definitely that Indiana *could* tax sales of goods manufactured outside Indiana in a case where the selling branch and buyer were located in Indiana and the goods were shipped direct from a factory or warehouse outside of Indiana to the buyer in Indiana.

Therefore, contrary to the view expressed by the Court below, we have shown very positively that there is glaring multiple taxation resulting from the inclusion of the 38%

of sales as business done in Ohio. This multiple taxation arises not only under the Indiana gross income tax and similar taxes on sales and gross receipts in other states, but also under the franchise taxes of 9 states and the net income taxes of 32 states and the District of Columbia.

This Court said in *International Harvester Company, et al.* v. *Department of Treasury, et al., supra,* that "it will be time to cross that bridge when we come to it," namely, the bridge of double taxation. We respectfully submit that we have now come to the bridge of double—indeed, of multiple—taxation.

In its attempt to avoid the obvious conflict with the commerce clause, the Supreme Court of Ohio asserts Ohio's right to include the sales in question as Ohio business under the authority of the case of *American Mfg. Company* v. *St. Louis,* 250 U. S. 459, on the ground that it is the *manufacturing* activity of the Appellant in Ohio which is being taxed. The Supreme Court of Ohio declares that "the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of *American Mfg. Company* v. *City of St. Louis* * * *."

The tax in the St. Louis case is entirely different from the Ohio franchise tax. The St. Louis tax was not a *corporate* franchise tax on the privilege of conducting business in *corporate* form, but was a tax definitely and specifically laid on the privilege of manufacturing, whether done by a person, partnership, association or corporation. The Ohio tax is laid only on corporations and solely because they are corporations.

In the case of *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, this Court pointed out the vital distinctions between

the St. Louis tax and the Indiana gross income tax. The same distinctions apply to the Ohio franchise tax. This Court found that the St. Louis tax was definitely and specifically laid on manufacturing activity, whereas the Indiana gross income tax was "not a tax on the manufacture but a tax on gross sales", pointing out that the Indiana tax excluded from taxable gross income receipts from sales made at established business locations outside of Indiana. A similar exclusion is made under the Ohio franchise tax, which omits from Ohio "business done" sales completed by delivery from warehouses outside of Ohio. Therefore, it can no more be said in respect to the Ohio tax than it could be said in respect to the Indiana tax, that the tax is a manufacturers' excise tax.

The vital and controlling reasons, therefore, why the decision in the St. Louis case does not support the validity of the Ohio tax, are:

(1) The St. Louis tax, being specifically laid on manufacturing activity, was a tax which only the City of St. Louis (or the State of Missouri) could impose. No other city and no other state could validly impose an excise tax on such manufacturing activity.

(2) The Ohio tax is a corporate franchise tax which may be imposed by every state in which appellant foreign corporation does business, and in that respect is like a sales or gross income tax which every state which the transaction touches could seek to impose against the interstate seller.

Therefore, as respects the question of validity under the commerce clause, an excise tax on manufacturing is a tax which can be imposed but once and can never become any more of a burden on interstate commerce than it is a burden on intrastate commerce. A corporate franchise tax, however, may be imposed in many states and by repeated impositions may place double and multiple burdens on inter-

state commerce which intrastate commerce does not bear. The validity under the commerce clause of a corporate franchise tax is to be tested, therefore, upon the same principles which were applied to test the Indiana gross income tax, namely: May the tax result in the imposition of double or multiple burdens on interstate commerce?

The Supreme Court of Ohio states in its opinion that it is "committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold," and that it is also committed to the "proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state." (146 O. S. 70, 64 N. E. (2d) 58.)

Of course Appellant does not contend that manufacturing is not doing business. It does not contend that Ohio could not tax the manufacturing activity of the Appellant in Ohio. Appellant does contend that the Ohio franchise tax is *not* a manufacturers' excise tax, but is a franchise tax on the doing of business as a foreign corporation, and that as a corporate franchise tax its validity is to be tested.

Ohio itself admits in effect that its franchise tax is not a manufacturers' excise tax. It subjects to the tax goods *manufactured outside Ohio* and sold in Ohio. And it excludes from the tax all sales of Springfield trucks where the trucks were sold by Appellant's branches outside Ohio from their own warehouse floors. Ohio-manufactured goods are included in the measure of Ohio business *only* when the trucks are shipped from the Ohio factory direct to the buyers; they are not included when the trucks are sold by the branches and delivered from the branch warehouses. But the Ohio manufacturing activity is mani-

festly as great in one case as in the other. It is obvious, therefore, that it is not a manufacturers' excise tax which is being imposed.

The levy of the one tax on one-half of the capital stock value by the property fraction is already a fair measurement of manufacturing activity in Ohio. The use of a sales fraction is a direct measurement of sales activity. A payroll fraction could also be used to measure manufacturing activity. Or Ohio could employ a manufacturing fraction, that is, Ohio manufacture divided by total manufacture. But to take only a property fraction and a sales fraction, as Ohio does, and to use first a property fraction which fairly measures Ohio manufacturing activity and then to take a sales fraction and to distort it by loading the numerator with both Ohio sales and "Ohio manufacture", and including only total sales in the denominator, results in the instant case in the imposition of a prohibited multiple burden on interstate transactions, because the so-called "Ohio manufacture" with which the numerator is arbitrarily loaded consists of sales made in interstate commerce, which are already validly subject to direct sales and gross receipts taxes and to indirect franchise and income taxes in many other states.

If Ohio wishes to go further and tax the manufacturing activity as such with a specific excise, the way is open of course for its legislature to take steps to reach it. Ohio may impose a manufacturers' excise tax on Appellant in addition to the instant corporate franchise tax, or it may empower the City of Springfield to impose such additional manufacturers' excise tax. We contend only that since the Ohio tax is definitely and specifically a corporate franchise tax, it is not permissible to distort it into a manufacturers' excise tax and thereby to screen its vices from all surveillance under the commerce clause.

This court held in *McLeod* v. *J. E. Dilworth Co.*, 322

U. S. 327, that the fact that the taxing state (Arkansas) could levy a valid use tax on purchases made by buyers within the taxing state from an out-of-state seller and require such seller to collect the tax from the buyer, would not support the imposition of a sales tax against the seller when such sales tax offended both the due process clause and the commerce clause of the Federal Constitution. By the same token, in the case at bar the fact that Ohio could impose a valid tax on the privilege of manufacturing in Ohio will not support the instant corporate franchise tax which offends the same clauses of the Federal Constitution. Paraphrasing the language of this Court in the *Dilworth* case, which held *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, not apposite to that case, we can say here that the *American Manufacturing Co.* case "affords no ground for rejecting the deliberate choice of a state" to impose a corporate franchise tax measured by extra-territorial values and interstate transactions and thereby sustaining that tax as one on manufacturing activities..

Conclusion.

Therefore, the Ohio franchise tax, as interpreted by the Commission's Rule No. 275, and as applied by the courts below to Appellant in this case, offends not only the due process clause but also the commerce clause of the Federal Constitution; the decision below should be reversed; and the case should be remanded for the determination of the tax properly owing after the exclusion from Ohio "business done" of the 38% of extra-state and interstate sales.

Respectfully submitted,

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APPENDIX A.

General Code of Ohio.

Section 5495. Fee charged against domestic corporations and foreign corporations.—The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

Section 5495-1. When domestic corporations shall be considered organized; foreign corporations.—For the purposes of this act domestic corporations shall be considered organized upon the filing of articles of incorporation in the office of the secretary of state and foreign corporations shall be considered admitted to do business in Ohio when the statement for admission has been filed with the secretary of state or upon obtaining from such secretary a certificate of compliance with the laws of Ohio. Each domestic corporation shall be required to file its first report and pay the tax thereon in and for the calendar year immediately succeeding the date of its organization and each foreign corporation shall similarly re-

port and pay in and for the calendar year immediately succeeding its admission. Failure on the part of any foreign corporation for profit to proceed according to law to obtain from the secretary of state proper authority to do business or to own or use property in this state shall not excuse such corporation from liability to make proper excise or franchise tax report or return or to pay a proper excise or franchise tax or penalty, if such liability would have attached had such proper authority been obtained.

Section 5495-2. Annual report to tax commission; dissolution or withdrawal of corporation.—Within thirty days after the taking effect of this act and annually, thereafter, between the first day of January and the thirty-first day of March each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state, or owning or using a part or all of its capital or property in this state, or having been authorized by the secretary of state to transact business in this state, shall make a report in writing to the tax commission in such form as the commission may prescribe. It shall be the duty of the commission to furnish corporations, on request, copies of the forms prescribed by it for the purpose of making such report. No domestic corporation may dissolve, nor may any foreign corporation withdraw or retire from business in Ohio, after January 1st in any year without having made a franchise tax report to the tax commission of Ohio, and having paid or secured the tax thereon, for the year in which such dissolution or withdrawal occurs.

Section 5496. Signatures on annual report.—The annual corporation report shall be signed and sworn to before an officer, authorized to administer oaths, by the president, vice-president, secretary, treasurer, general manager, superintendent, or managing agent in this state,

of such corporation. If a domestic corporation has not completed its organization, its annual report shall be signed and sworn to by one of its incorporators.

Section 5497. Contents of annual report.—The annual corporation reports shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

1. The name of the corporation;

2. The name of the state or country under the laws of which it is incorporated;

3. The location of its principal office and, in the case of a foreign corporation, the location of its principal place of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

4. The names of its president, secretary and treasurer, with the post office address of each;

5. The nature and kind of business in which such corporation is engaged;

6. The date of the beginning of the current annual accounting period of the corporation;

7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding

annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business;

9. The value of the good will of the corporation as shown on its books if carried thereon as an asset.

Section 5498. Determining the value of the issued and outstanding shares of stock and intangible property; certification to auditor of state.—After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet as showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the de-

duction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into t equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of Section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation.

Section 5499. Charging fee for collection; payable to treasurer; failure to pay fee; penalty.—On or before June

15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent upon such value so certified and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars.

Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each corporation at its principal office in the state of Ohio, or to such person in the state of Ohio as the corporation may designate in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as is provided in section 5491 of the General Code. But no penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S REPLY BRIEF.

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CORRECTION OF APPELLEE'S STATEMENTS OF FACTS.

We regret the necessity of pointing out certain inaccurate statements in Appellee's brief, of facts crucial to the issues in this appeal.

On page 12 of Appellee's brief it is stated:

> "Neither are sales made in Ohio [included in Ohio business] if the products sold are shipped in furtherance of such sales from out of the state factories and warehouses."

and on page 16:

> "It [Ohio] has excluded all Ohio sales where the goods sold are shipped into Ohio from other states."

Appellee in its brief before the Supreme Court of Ohio made the same contention. Appellant pointed out in the court below that there was no shred of evidence to support Appellee's statement, and that the direct, uncontradicted evidence was to the contrary. Yet Appellee brings up the point now once more. Not a single citation from the Record is offered in its support, and we respectfully submit that there is no evidence whatsoever in the Record in support of Appellee's statement. It is directly contrary to the testimony of Charles L. Johns, Auditor of Tax Returns of Appellant. Moreover, it is flatly opposed to the findings of the Board of Tax Appeals.

Mr. Johns was asked:

> "Q. I will ask you next if, in arriving at the assessments involved in this appeal, any deduction has been made for the value or amount of goods manufactured outside of Ohio—by the company outside of Ohio—and shipped direct to Ohio buyers on sales made by Ohio branches?
>
> "A. No, sir." (R. 20.)

This testimony was introduced by Appellant. Appellee introduced no evidence to the contrary. In Appellee's brief before the Board of Tax Appeals this testimony was not questioned.

Moreover, in the decision of the Ohio Board of Tax Appeals, the Board found as follows:

> "In determining the value of business done in Ohio during the remaining years, [namely 1936 to 1939 inclusive], the tax commissioner used the value of the sales of all goods manufactured in Ohio, sold and delivered within and without the state, plus the value of the goods manufactured outside Ohio and sold to Ohio customers." (R. 71.)

The Ohio Board of Tax Appeals also stated that:

> "All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches." (R. 74.)

Again, the Ohio Board of Tax Appeals found that:

> "the action of the tax commissioner in including in the numerator of the business fraction the value of all sales of goods manufactured outside of Ohio to customers in Ohio was proper, and the same hereby is affirmed." (R. 76, lines 3-7.)

The Supreme Court of Ohio affirmed in all particulars the decision of the Board of Tax Appeals.

Appellee also suggests on page 17 of its Brief that the Board of Tax Appeals may have given Appellant undue credit for Springfield trucks shipped to branches in other states and sold from the branch house floors. Appellee's brief states that:

> "some of the warehouses which received the 62% of the output of appellant's Ohio factories were Ohio warehouses and to this extent should not have been excluded (R. 45)."

But the sales by Ohio branches of Springfield trucks were not excluded under the decision of the Board of Tax Appeals. In arriving at the 62% figure, all shipments of Springfield trucks to destinations in the United States were considered in order to ascertain the percentage shipped to branches and the percentage shipped to dealers and users everywhere in the United States, but the resulting 62%

is to be applied only to the shipments of Springfield trucks to points in the United States, outside of the State of Ohio. The decision of the Ohio Board of Tax Appeals explicitly provided that:

> "the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified." (R. 79.)

On Appellant's returns it included all sales by its Ohio branches to Ohio buyers of Springfield motor trucks, Paragraph 11, column B (R. 69); and paragraph 12, "Total sales in Ohio per return." (R. 69.) Having already been included as a measure of the tax in Appellant's returns, such Ohio sales of Springfield trucks will necessarily be included in the final measure of the tax. In short, they are in no way affected by the 62% exclusion.

Due Process of Law.

Appellee's brief avoids meeting the exact issue of the denial of due process of law raised by Appellant. Of course Ohio may impose a franchise tax on Appellant for the privilege of doing local business in Ohio, and under a constitutionally valid tax Ohio may within reason make the amount of the tax relatively high or low, depending only on the rate of tax imposed. But Ohio must impose a tax founded upon a valid constitutional basis, which it has failed to do. Ohio's franchise tax formula employs in the numerator of the business done fraction both Ohio *sales* and Ohio *manufacturing* activity while including only total *sales* everywhere in the denominator. Such an unbalanced formula

necessarily results in attributing to Ohio an excessive and arbitrary proportion of Appellant's capital stock value.

If Ohio may thus use a distorted business done fraction, so may every state in which Appellant does business, with the result that more than 100% of Appellant's capital stock value would be taxed in the several states. The fact that Ohio may impose a franchise tax upon a proper formula, and perhaps collect an even greater tax, will not validate its use of a formula which is found to be unsound if all the states should attempt to use it. If Ohio may use the formula adopted in this case, then every state may arbitrarily measure its franchise tax by any kind of extrastate or interstate activity or property, so long as the same amount of tax could be imposed by the use of a proper measure.

The position of Appellee is inconsistent and indefensible. Ohio seeks to include in business done in Ohio both sales by Ohio branches of goods shipped direct from factories outside Ohio to buyers in Ohio, and also sales by branches outside Ohio of Springfield trucks shipped direct from Springfield to buyers in other states. Both of these classes of sales simply cannot be Ohio business.

Ohio is attempting to use as the measure of Appellant's franchise tax, sales of Springfield trucks which when made by branches in ten other states,[1] which levy franchise taxes on the Appellant, are used as a measure of those franchise taxes. When sales of Springfield trucks, used as a measure of Appellant's Ohio franchise taxes, are made by its branches in thirty-one states and the District of Columbia,[2] which impose income taxes on the Appellant, the same sales are used as a measure in determining Appellant's income taxes in those jurisdictions. Finally, sales of Springfield

1. See Appendix A.

2. See Appendix B. In Appellant's brief the number of franchise tax states was inadvertently given as 9 and the number of income tax jurisdictions as 32 states and the District of Columbia, instead of the correct number given above, namely 10 franchise tax states and 31 income tax states and the District of Columbia.

trucks which Ohio is attempting to use as a measure of Appellant's Ohio franchise taxes, are subject to direct sales and gross receipts taxes when made in still other states. The simple fact is that these sales are not Ohio sales or Ohio business done; they were effected and handled from first to last by branches outside Ohio; and for Ohio to attempt to measure its tax by such out-of-state sales is "to project its powers beyond its boundaries" and to tax extra-territorial values by attributing an excessive proportion of *Appellant's capital stock value to Ohio. This is a denial of* due process of law.

Violation of the Commerce Clause.

Appellee relies solely on the earlier decisions of this Court in which the question of the actual imposition of multiple tax burdens on interstate commerce was not and could not be raised. Appellee can cite no decision of this Court upholding the validity of corporate franchise taxes imposed by two or more states and measured by the same receipts derived from interstate sales. In this case, that issue is squarely presented for the first time to this Court.

Ten states[3] in which Appellant does business measure their corporate franchise taxes by the receipts from sales made by Appellant's branches in those states, including sales of goods manufactured at Appellant's Springfield plant, and shipped direct from the Springfield plant to the buyers outside Ohio.

Thirty-one states and the District of Columbia[4] measure their net income taxes imposed on Appellant by the same sales of Springfield trucks in those taxing jurisdictions which the Tax Commissioner has included as Ohio business in the assessments here involved.

Under the decision of this Court in *International Harvester Company* v. *Department of Treasury, et al.*, 322 U. S.

3. See Appendix A.
4. See Appendix B.

340, the same sales are subject to direct sales and gross receipts taxes in all states where Appellant's selling branches and the buyers are located.

Now, Ohio seeks to use the same receipts from out-of-state sales as the measure of its franchise tax assessed against Appellant. This, we submit, is indeed multiple taxation of interstate commerce and so burdens interstate commerce as to constitute a regulation thereof. Either the Ohio tax, in the instant case, places a prohibited burden on interstate commerce, *or* the commerce clause of the Constitution no longer places any restriction on the rights of the states to impose duplicate and multiple tax burdens on commerce among the states.

This Court in holding that state taxes did not violate the Commerce Clause has frequently made the point that there was no showing of double taxation. Here we have a definite showing of double, indeed, of multiple taxation. If the fact that there is a lack of double taxation is an argument for sustaining a tax, it would certainly seem that the presence of double or multiple taxation should be a conclusive argument for invalidating a tax.

Respectfully submitted,

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APPENDIX A.

State Franchise Taxes Measured by Receipts from Sales of Trucks Shipped From Appellant's Springfield Plant.

Illinois, Smith-Hurd Ann. Illinois Statutes, Permanent Edition, Chapter 32, Sec. 157.136 *et seq.*

Kansas, General Statutes of Kansas, 1935, as amended, Sec. 17-702. Annual License Fee.

Kentucky, Kentucky Revised Statutes, 1942, Sec. 136.070. Corporation License Tax.

Louisiana, Dart's 1939 Code, as amended, G. S. 1399, Sec. 8723.

Mississippi, Mississippi Code of 1942, Secs. 9314, 9319.

North Carolina, General Statutes of North Carolina, 1943, Ch. 105, Sec. 105-122.

Oklahoma, Oklahoma Statutes, 1941, Title 68, Ch. 17, Sec. 638. Annual License Fee.

Pennsylvania, Purdon's Pennsylvania Statutes, Ann., 72 P. S., Sec. 1871.

Texas, Vernon's Texas Statutes, 1936, Secs. 7084-7097.

Washington, Remington's Revised Statutes of Washington, Sec. 3836-5. Annual License Fee for Foreign Corporations.

APPENDIX B.

State Income Taxes Measured by Receipts From Sales of Trucks Shipped From Appellant's Springfield Plant.

Alabama, Code of Alabama 1940, Title 51, Ch. 17, Income Taxes, Sec. 402(12).

Arizona, Arizona Code of 1939, Sec. 73-1524.

Arkansas, Pope's Digest of the Statutes of Arkansas, 1937, Sec. 14,038.

California, California Statutes of 1929, Ch. 13, as amended, Sec. 10. Bank and Corporation Franchise Tax, based on income.

Colorado, Colorado Laws of 1937, Ch. 175, Sec. 17.

Connecticut, General Statutes of Connecticut, Revision of 1930, as amended, Cum. Supp. 1935. Sec. 420c. Corporation Business Tax, based on income.

Georgia, Georgia Code of 1933 as amended, Ch. 92-3113.

Idaho, Idaho 1932 Code, Sec. 61-2416.

Iowa, Code of Iowa 1939, Ch. 329.3, Sec. 6943.065.

Kansas, General Statutes of Kansas, 1935, as amended, Sec. 79.3218.

Kentucky, Kentucky Revised Statutes, 1942, Sec. 141.120.

Louisiana, General Statutes of Louisiana 1939, Sec. 8587.34.

Maryland, Ann. Code of Maryland (1939 Edition), Art. 81, Sec. 253.

Massachusetts, General Laws of Massachusetts, Ch. 63, Sec. 38. Business Excise Tax Bases on Income.

Minnesota, Mason's Minnesota Statutes, 1927, 1938 Supp., Secs. 2934-25.

Mississippi, Mississippi Code, 1942, Title 36, Sec. 9231.

Missouri, R. S. Missouri 1939 as amended, Sec. 11343.

Montana, Rev. Codes of Montana, 1935, Sec. 2297.1. Corporation License Tax based on income.

New York, New York Tax Law. Art. 9-A, Sec. 214. New York Franchise Tax based on income. (As in effect for 1936-1939 inclusive. Repealed by Ch. 415, Laws 1944, effective March 31, 1944, and replaced by the present Art. 9-A.)

North Carolina, General Statutes of North Carolina, 1943, Ch. 105, Sec. 105-134.

North Dakota, Rev. Code of North Dakota, 1943 as amended, Sec. 57-3813.

Oklahoma, Oklahoma Statutes, 1941, Title 68, Ch. 21, Sec. 878.

Oregon, Oregon Compiled Laws Ann. as amended, Ch. 15, Sec. 110-1507. Corporation Excise Tax based on income.

Pennsylvania, Purdon's Pennsylvania Statutes, Ann., 72 P. S., Sec. 3420(b).

South Carolina, Code of Laws of South Carolina 1942, Civil Code, Title 25, Ch. 107, Sec. 2451.

South Dakota, South Dakota Code of 1939, Ch. 57.27, Sec. 57.2707.

Tennessee, 1932 Code of Tennessee, Sec. 1316. Corporation Excise Tax based on income.

Utah, Utah Code Ann. 1943, as amended, Title 80, Sec. 80-13-21. Franchise tax based on income.

Vermont, Public Laws of Vermont 1933, Secs. 888, 894. Corporation Franchise Tax based on income.

Virginia, Tax Code of Virginia (1936) as amended, Sec. 54. Virginia Code of 1942.

Wisconsin, Wisconsin Statutes, Ch. 71, Sec. 71.02(3).

District of Columbia, District of Columbia Code, Title 47, Ch. 15, Sec. 47-1504.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75.

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

OPINIONS BELOW.

This case was initiated in the Board of Tax Appeals of Ohio. The opinion of the Board of Tax Appeals is contained in its journal entry which is not officially re-

ported, but is set forth in the transcript of record in this case commencing at page 65 thereof. The opinion of the Supreme Court of Ohio is reported officially in 146 O. S., 58, and unofficially in 64 N. E. (2d), 53.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

In the assessment of the Ohio franchise fee against the appellant, a foreign corporation, for the years 1935 to 1940, inclusive, the tax commissioner of Ohio used such figures as were made available to him by the appellant in its returns and otherwise. Appellant contends that the use of such figures resulted in assessments which included as Ohio business done some business which should have had an extra-state situs.

Contending, so far as is relevant to the present appeal, that such assessments resulted in "a denial of due process of law under the due process clause of the Fourteenth Amendment to the Constitution of the United States" and the laying of "an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States,"[1] appellant appealed to the Board of Tax Appeals of Ohio and subsequently to the Supreme Court of Ohio, each of which tribunals sustained the assessments. (International Harvester Company v. Evatt, 146 O. S., 58, 64 N. E. (2d), 53.) An appeal was then filed in this court. On May 6, 1946, probable jurisdiction was noted.

[1] See appellant's assignment of errors (R., 2).

STATEMENT OF THE CASE.

A. Appellant's Limitation of the Scope of Its Appeal.

Before the Board of Tax Appeals of Ohio and the Supreme Court of Ohio the appellant challenged the validity of the franchise fees against it for the tax years 1935 to 1940, inclusive. In its appeal to this court appellant has raised no question as to the validity of the assessments for the first two years of said period and has stated on page 8 of its brief herein that "This appeal is limited to the franchise taxes for the years 1937 to 1940, inclusive."

B. Statement of Facts.

Although the facts have been set forth in considerable detail in appellant's brief, it appears appropriate again to review the facts for the purpose of pointing out some differences in our views of what the evidence disclosed and to direct the court's attention to certain matters apparently deemed inconsequential by the appellant.

The appellant in and during the years 1936 to 1939, both inclusive, was a corporation organized under the laws of New Jersey. Its principal office was located in Chicago, Illinois. It was engaged in the business of manufacturing and marketing agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof. During said period it operated two factories in Springfield, Ohio, and several other factories located in other states (R., 56, Stip. 1). For the purpose of marketing its products, appellant operated branch houses in thirty-five states (R., 18, 19). Each

branch had a sales organization, collection and accounting facilities and a warehouse (R., 19). Appellant also sold through dealers and retail stores, and through Canadian and foreign subsidiary sales corporations (R., 57, Stip. 3(a), (b), (c), and (d)). Sales made by such outlets were completed by deliveries either from warehouse stocks or directly from appellant's factories upon orders from branch houses or the Chicago office.

Section 5499, General Code of Ohio (Appendix C), levies an annual fee or tax on all corporations licensed to do business in the state of Ohio, both domestic and foreign, of 1/10 of 1% on a tax base or value which the tax commissioner (formerly the tax commission) is required, as provided in Section 5498, General Code of Ohio (Appendix B), to certify to the auditor of state. This fee, Section 5495, General Code of Ohio (Appendix A), provides, is, in the case of a foreign corporation, for the privilege of doing business in Ohio or owning or using a part or all of its capital or property in the state of Ohio or for holding a certificate of compliance with the laws of Ohio authorizing it to do business in Ohio during the calendar year in which such fee is payable.

Contrary to the assertions and implications found in appellant's brief, Ohio has only this one franchise fee or tax. The tax base is determined pursuant to a formula found in Section 5498, General Code of Ohio (Appendix B), wherein the value of all issued and outstanding stock of the corporation is determined and this value divided into two equal parts. One of these parts is multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used in

Ohio and whose denominator is the fair value of all its property wheresoever situated. The second part is multiplied by a fraction whose numerator is the value of the business done by the corporation in Ohio during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said preceding year wherever transacted. The sum of the figures thus obtained is the tax base or value which the tax commissioner is required to certify to the auditor of state for assessment of the fee.

The questions presented by this appeal concern only the determination of the numerator of the business fraction, that is, the value of the business done by the corporation in the state of Ohio during the preceding year. For the purpose of determining the value of Ohio business, the tax commissioner on October 13, 1939, adopted Rule No. 275 (Appendix D), which is as follows (R., 64, Stip. 16):

> "Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made."

While the appellant was able to furnish the tax commissioner with the amounts of sales made by Ohio branches plus sales of parts direct to customers at the Springfield, Ohio, factories (R., 62, Stip. 12) and to furnish figures showing the total sales of the products of the Springfield factories (R., 89, 90, Ex. G, R. [1]) and the sales of the Springfield factories' products by Ohio branches (R., 102, Ex. G, R. [1]), it was unable to furnish the commissioner with a breakdown of such figures which would show what portion of the products of the Springfield factories was sold from warehouses outside of the state of Ohio (R., 31, 32). The best figures it was able to furnish were estimates for the fiscal year 1939 compiled from an examination of about 56,000 invoices showing that about 62% of the output of the Springfield factories was shipped to warehouses and 38% was shipped directly from Springfield to dealers and customers (R., 32, Ex. 5, R., 46, 79). Appellant's witness stated, however, that "No breakdown has been made. No breakdown can be made," respecting the number of trucks that were shipped to warehouses in Ohio and those shipped to warehouses outside of Ohio (R., 45). Furthermore, no evidence was offered to show what portion of the 62% shipped to warehouses was so shipped for the purpose of completing sales already made as distinguished from that portion shipped to warehouses in anticipation of future sales. Notwithstanding these dis-

[1] Appellee's Exhibit G was offered and admitted in evidence by the Board of Tax Appeals as shown on page 69 of the transcript of record filed with the Supreme Court of Ohio. This part of the record is included in portions of the original record which were deleted at the time of the printing of the record filed with this court.

tinct advantages to the appellant, the Board of Tax Appeals found that 62% of the output of appellant's Springfield factories was sold from warehouses outside the state of Ohio and that it should be assumed that the same percentage applied to the years 1936, 1937 and 1938 (R., 76, 77) and the value of the Ohio business done in the numerator of the business fraction was ordered reduced proportionately.

Upon review by the Supreme Court of Ohio, the tax was held to be constitutional and the order and determination of the Board of Tax Appeals was affirmed, no cross appeal having been filed by the tax commissioner.

SUMMARY OF ARGUMENT.

There Was No Denial Of Due Process.

The questioned Ohio fee is levied against every corporation for the privilege of doing or having the right to do business in Ohio. Two factors are considered in the determination of the franchise fee. First, there is considered the property owned and used in Ohio as compared with the corporation's entire property. Second, there is considered the business done in Ohio as compared with the corporation's entire business wherever transacted. Appellant questions only the value of the Ohio business done. Ohio business done is measured by the value of all sales wherever transacted of goods either warehoused or manufactured in Ohio, except sales of goods sold from warehouses outside of Ohio. Appellant contends that Ohio business done should be determined by a different formula and that the formula which is used by Ohio results in the taxation of extra-state busi-

ness in violation of the due process clause of the Fourteenth Amendment. The cases relied upon by the appellant deal with taxes on sales, gross receipts, gross income and the like. State statutes attempting to tax sales, transactions, income or receipts made or arising in other jurisdictions have been consistently stricken down as being in violation of the Constitution. Such decisions, however, are not controlling in the present situation, for Ohio has not attempted to tax property, income, receipts or sales. It has taxed only the right or privilege of the appellant to do business in Ohio for current years measured by the business done during the preceding years. This court has repeatedly held that the due process clause is not violated by a statute taxing the right to exercise corporate privileges in a state where the amount of the tax is measured by the amount of sales of locally manufactured goods, whether sold within or without such state, so long as the apportionment designated is reasonably fair and applies to all corporations alike. The Ohio act meets all the requirements of the due process clause and should therefore be sustained.

There Is No Violation Of The Commerce Clause.

The Ohio franchise fee is a tax upon domestic and foreign corporations for the privilege of doing or holding a license to do domestic business in the state of Ohio. Such a tax is valid even if interstate transactions are used in part in the determination of the tax. There is no direct and immediate burden on interstate commerce, no attempt to tax sales or receipts therefrom and no at-

tempt to make the legality of sales or transactions in any way dependent upon payment of the tax. Sales, both local and interstate, are only indirectly affected in the same manner as they are affected by any other tax upon a corporation, such as a tax upon its property.

The use of such sales as are completed by deliveries of goods from Ohio factories and warehouses, as a measurement of the tax, meets all the requirements of the commerce clause. There could be no double taxation, as appellant contends, for if other states have similar taxes each sale could be claimed by only one state, to wit, that state from whence the goods were shipped. The fact that other states may have gross receipts taxes, sales taxes and the like, as shown in the cases relied upon by the appellant, is of no consequence, for the Ohio tax is only for the privilege of doing business, measured in part by local and in part by some interstate business. The Ohio tax effects a reasonable allocation of business to Ohio which is all that is required of franchise taxes by the commerce clause. Since the Ohio tax does not regulate nor burden either local or interstate commerce, appellant's second assignment of error is not sustained.

ARGUMENT.

The Ohio Franchise Fee Being A Privilege Tax Upon the Right To Exercise Corporate Powers Within the State for the Current Year, Measured by Sales of Ohio Goods During the Preceding Year, Meets All the Requirements of the Due Process Clause of the Fourteenth Amendment.

During the entire period involved herein, Ohio has had a franchise fee or tax which is levied without discrimination upon both domestic and foreign corporations. The purpose of the tax is stated in Section 5495, General Code of Ohio (Appendix A). The nature of the tax is further disclosed in the first three branches of the syllabus in the case of **Aluminum Company v. Evatt**, 140 O. S., 385, 45 N. E. (2d), 118, wherein it was held:

> "1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code.)
>
> 2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the foreign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.
>
> 3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales."

The method by which the tax is computed is well summarized by the Supreme Court of Ohio in its decision from which this appeal has been taken, **International Harvester Company v. Evatt**, 146 O. S., 58, 64 N. E. (2d), 53, in the first branch of the syllabus which is as follows:

"1. For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The tax commissioner then certifies to the auditor of state the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the treasurer of state. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of

stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)"

From the foregoing, it is seen that Ohio has a privilege tax that is measured in part by that portion of its entire business as is done in the state of Ohio. No statutory formula is set forth for the determination of business done, but by the adoption of a rule (Rule No. 275, Appendix D) which followed years of administrative practice, as disclosed by Opinions of the Attorney General of Ohio[1], Ohio business done has been measured by the value of sales of goods supplied from Ohio warehouses and factories regardless of whether such sales are made in Ohio or elsewhere. But such portion of the output of an Ohio factory as has been warehoused outside of Ohio awaiting sale is not included in Ohio business. Neither are sales made in Ohio if the products sold are shipped in furtherance of such sales from out of the state factories and warehouses. Thus, it is seen that a reasonably accurate formula for apportionment has been adopted.

---

[1] In 1915 the then attorney general of Ohio held as shown in the Opinions of the Attorney General for 1915, at page 460:

"The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable and lawful under Section 5502 to measure the volume of such business by sales of manufactured articles, whether such sales otherwise represent interstate commerce or not."

In 1937 the then attorney general of Ohio held as shown in the Opinions of the Attorney General for 1937, at page 220:

"Sales made of products manufactured in Ohio, from the company's factories located in this state to customers within and outside of Ohio are to be considered Ohio business, for the purpose of determining the franchise tax to be assessed under the laws of this state."

In **Illinois Central R. Co. v. Minnesota**, 309 U. S., 157, 161, it was said that mathematical exactitude in the apportionment is not a constitutional requirement. "Rough approximation rather than precision is, as a practical matter, the norm in any such tax system." See also **Dane v. Jackson**, 256 U. S., 589, 599.

Appellant contends that Rule No. 275 violates the due process clause of the Fourteenth Amendment for the reason that sales made in other states are included as Ohio sales if the goods are shipped from either an Ohio warehouse or an Ohio factory. In other words, it is contended that Ohio should not use the point of shipment as the test for allocation. It is urged that instead there should be substituted as the test the place where the sale was consummated. As authority for this contention, appellant relies upon one of its former cases before this court, **International Harvester Company v. Department of Treasury**, 322 U. S., 340, and in particular the holding on what was described therein as "Class E sales." These were sales "by an Indiana seller to an Indiana buyer where the goods were shipped from points outside the state to the buyer." (p. 346.) The tax there in question was a privilege tax upon the receipt of gross income. It was the same tax considered in **J. D. Adams Manufacturing Co. v. Storen**, 304 U. S., 307, also relied upon by the appellant. The distinction between these cases and the instant case is plainly pointed out in the Adams Manufacturing Company opinion by Mr. Justice Roberts (p. 310), where, referring to the Indiana gross income tax, it was said:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross in-

come of non-residents from sources within the state. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales such as the state would be competent to demand from domestic or foreign corporations for the privilege conferred."

The Ohio tax is not a tax upon the transfer of property nor is it a tax upon the consummation of transactions measured by the gross receipts from sales. Quite to the contrary, it has been definitely held to be a franchise tax, an excise tax laid on the privilege of doing business in Ohio for the current year measured by the value of the Ohio business done in proportion to the entire business during the preceding year. Business done in turn is allocated to the point from which the goods sold were taken from stock, whether it be a warehouse or factory. See **Aluminum Company v. Evatt**, 140 O. S., 385, 45 N. E. (2d), 118; and **International Harvester Company v. Evatt**, 146 O. S., 58, 64 N. E. (2d), 53.

In the Aluminum Company case, it was further held in the third branch of the syllabus that:

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales."

In the International Harvester Company opinion (R., 119), it was said:

"As pointed out above, the instant case does not involve a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege

of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, supra, which we approve and follow here, and in the instant case, we relied upon and now rely upon, inter alia, American Mfg. Co. v. City of St. Louis, 250 U. S., 459, 63 L. Ed., 1084, 39 S. Ct., 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, 66 L. Ed., 622, 42 S. Ct., 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U. S., 429, 73 L. Ed., 781, 49 S. Ct., 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S., 284, 71 L. Ed., 1049, 47 S. Ct., 639."

Appellant also relies upon the case of **Hans Rees' Sons, Inc., v. North Carolina**, 283 U. S., 123. Concerning the inapplicability of this case, it was said in the opinion in **Aluminum Company v. Evatt**, 140 O. S., 385, at page 401:

"The Hans Rees' Sons case involved a North Carolina statute imposing an income tax. As the state attempted to allocate from 66 to 85 per cent of the corporation's income to North Carolina, whereas the evidence showed that only 17 per cent of the corporation's income was earned in North Carolina, the court held, not that the interstate commerce clause was violated, but that as the income tax was applied by the state authorities the result was so arbitrary and unreasonable as to be beyond the state's power.

Bearing in mind that the court was there dealing with an income tax law, note the following language used by Mr. Chief Justice Hughes at page 133:

'But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean

that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state.'

No question of income, gross or net, is involved in the instant case. No attempt is made to tax any part of appellant's income, either within or without this state. Neither is appellant's income, gross or net, used as any part of the measure of the tax. Instead of an income tax law, we are dealing in the instant case with a franchise tax imposed 'for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.'

The privilege is not confined merely to 'doing business.' It is a tax on purely local activities, and like the ordinance in American Mfg. Co., supra, it is measured by the business done in Ohio, to wit, the manufacturing."

Appellant assumes that the Ohio formula allocated an excessive value to this state. That is an unwarranted assumption. Surely Ohio has a right to consider goods manufactured and warehoused within its borders as a measuring stick. But Ohio has not gone that far. It has excluded from the computation all Ohio manufactured goods that are shipped to warehouses in other states. It has also excluded all Ohio sales where the goods sold are shipped into Ohio from other states. If appellant did not receive full credit for sales of this type, it has only itself to blame for failing to furnish the required information to the tax commissioner (R., 31, 32, 45). The

Board of Tax Appeals accepted an estimate made by the appellant for 1939 and projected it into the earlier years on the unsupported assumption that conditions were approximately the same, whereby 62% of the output of appellant's Springfield factories was excluded from the numerator of the business done fraction. Such credits resulted in distinct advantages to the appellant, for some of the warehouses which received the 62% of the output of appellant's Ohio factories were Ohio warehouses and to this extent should not have been excluded (R., 45). Furthermore, some of such shipments from the Ohio factories to branch warehouses were in all probability made for the purpose of fulfilling orders already accepted, which, under the tax commissioner's rule, should have been included in the Ohio business done. The term "sales from warehouses," as used in the rule, refers only to sales of goods stocked in the warehouses; goods that have come to rest therein. From the foregoing, it appears that due to the deficiency in information furnished the tax commissioner by the appellant, and due to the lack of evidence furnished the Board of Tax Appeals, it is possible that appellant may have received a benefit not enjoyed by other similar Ohio taxpayers when the Board of Tax Appeals made it an allowance of a speculative 62% credit. Under a somewhat similar set of facts in the case of **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, Mr. Chief Justice Clarke said on page 293:

> "If the secretary of state or the court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason, in a proper case, for correcting the

computation, but would not justify declaring the act unconstitutional."

Appellant, condemning what is described as "an arbitrary allocation formula," cites and relies upon **Cudahy Packing Company v. Hinkle**, 278 U. S., 460; **Looney v. Crane Company**, 245 U. S., 178; and **Air-Way Electric Appliance Corporation v. Day**, 266 U. S., 71. As we have demonstrated, this assertion of arbitrary allocation is unwarranted. A reasonable apportionment has been made by the statutes as interpreted. The cases cited by the appellant are here distinguishable in the same manner as was pointed out by Mr. Justice Stone in the case of **International Shoe Company v. Shartel**, 279 U. S., 429, wherein he said beginning at page 433, "The tax is distinguishable from those considered in **Air-Way Electric Appliance Corporation v. Day**, 266 U. S., 71, **Looney v. Crane Co.**, 245 U. S., 178, and **Cudahy Packing Co. v. Hinkle**, 278 U. S., 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

The power of a state to levy an excise tax upon a foreign corporation for the privilege of doing business within its borders has been repeatedly recognized by this court. **National Leather Company v. Massachusetts**, 277 U. S., 413, 423; **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, 293; **American Manufacturing Company v. St. Louis**, 250 U. S., 459, 463; and **Maxwell v. Bugbee**, 250 U. S., 525, 539. The taxing statute will not be considered as violative of the due process

clause of the Fourteenth Amendment unless it is patently arbitrary or grossly unequal, making it in effect a means of confiscation of property rather than a tax. **A. Magnano Company v. Hamilton**, 292 U. S., 40, 44; **Dane v. Jackson**, 256 U. S., 589, 599; **Maxwell v. Bugbee**, 250 U. S., 525, 539, 540; **Mount St. Mary's Cemetery Association v. Mullins**, 248 U. S., 501, 505. The due process clause of the Fourteenth Amendment is not violated unless the apportionment is clearly arbitrary and unreasonable. **Hans Rees' Sons, Inc., v. North Carolina**, 283 U. S., 123; and **Maxwell v. Bugbee**, 250 U. S., 525, 539.

Where a state acting within its authority levies a privilege tax, it may use as a measure of such tax, property or transactions which are in themselves within the jurisdiction of a state for purposes of taxation. **Great Atlantic & Pacific Tea Company v. Grosjean**, 301 U. S., 412, 424; **Maxwell v. Bugbee**, 250 U. S., 525, 539; **American Manufacturing Company v. St. Louis**, 250 U. S., 459; and **International Shoe Company v. Shartel**, 279 U. S., 429, 433.

From the foregoing, it seems inescapable that there is no violation of the due process clause. Ohio has sought to tax only those privileges which the appellant has enjoyed within her borders. Such a tax may be measured in part at least by transactions or sales that were consummated in other states where the goods sold were delivered from Ohio stocks. **American Manufacturing Company v. St. Louis**, 250 U. S., 459.

The Ohio Franchise Fee Being A Privilege Tax Upon the Right To Exercise Corporate Powers Within the State for the Current Year, Measured by Sales of Ohio Goods During the Preceding Year, Does Not Violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

Under our argument showing that the Ohio franchise fee does not violate the due process clause, we have described the nature of the tax. We refer back to such description rather than prolong this brief with repetition.

The commerce clause does not prevent a state from levying a franchise or privilege tax upon a foreign corporation for the privilege of doing business within the state even though the corporation is engaged in interstate as well as intrastate commerce. **International Shoe Company v. Shartel**, 279 U. S., 429, 433; **Schwab v. Richardson**, 263 U. S., 88, 92; **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, 294. Such a tax is valid even if interstate transactions are used in its computation, if interstate commerce is not directly and immediately affected thereby and if interstate commerce is not unduly regulated, burdened or restrained by the tax. **International Harvester Company v. Department of Treasury**, 322 U. S., 340; **Southern Natural Gas Corporation v. Alabama**, 301 U. S., 148, 156; **Atlantic Lumber Company v. Commissioner**, 298 U. S., 553; **Western Cartridge Company v. Emmerson**, 281 U. S., 511; **Schwab v. Richardson**, 263 U. S., 88; **Hump Hairpin Manfacturing Company v. Emmerson**, 258 U. S., 290; **Underwood Type-**

writer Company v. Chamberlain, 254 U. S., 113, 119; and **American Manufacturing Company v. St. Louis**, 250 U. S., 459. The Ohio franchise fee meets these tests. It is a tax on the right to conduct intrastate business by domestic and foreign corporations. In the case of corporations doing both intrastate and interstate business, such as the appellant, the Ohio statutes reasonably apportion the business done. That some of the sales considered in arriving at the measurement of the Ohio business done are interstate sales is of no consequence, for the value of such sales and intrastate sales are used together only as one of the elements in the process of determining the assessment. The use of interstate sales under the Ohio statutes only indirectly affects interstate commerce and is not a burden thereon nor an attempt at regulation. The tax applies alike to both domestic and foreign corporations whether they do solely intrastate business or are engaged in both intrastate and interstate transactions. In **Gwin, White & Prince v. Henneford**, 305 U. S., 434, Mr. Justice Stone said (p. 438):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens, Postal Telegraph Cable Co. v. Richmond, 249 U. S., 252, 259, and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden."

Appellant contends that **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, and **Western Cartridge Company v. Emmerson**, 281 U. S., 511, should be distinguished from the present appeal. The distinctions attempted, however, have no legal significance. In

the Hump Hairpin Company case, this court found (p. 294) that although the corporation's activities reduced the interstate element in its business to the lowest terms, interstate business was being done and the question remained whether the use made by the amount of such interstate business in determining the amount of the tax, rendered it invalid. It was concluded as "settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights." On page 295 the Illinois tax, which is remarkably similar to the Ohio tax, is analyzed and found to meet all the constitutional requirements.

In the Western Cartridge case, it is said (p. 514) that the fee does not depend upon the amount of interstate transactions and that "The exaction may arise while the sales to customers outside Illinois decline and may fall while such sales increase." Appellant contends that such a situation could not obtain in Ohio. To us it seems plain that the amount of property owned and used in Ohio might increase or decrease without any relation to the amount of interstate commerce done. So too the franchise fee might increase or decrease, depending upon the number of sales filled from Ohio warehouses and factories without any regard to the amount of interstate commerce. For example, the entire output of the Ohio factories might have been first warehoused in another state and all Ohio sales filled from outside warehouses and factories, in which case Ohio would get nothing by reason of the business done fraction.

Appellant further states in its brief (pp. 26, 27) "But the vital and compelling reason why the inclusion of the 38% of sales as Ohio business results in laying a prohibited multiple burden on interstate commerce is that the very same sales are directly taxed or are used as the measure of a tax in many states where the appellant has its branch houses." It must be remembered that Ohio is not attempting to collect a sales tax from the appellant. Ohio is not attempting to tax or in any wise regulate the sales or transactions of the appellant. Ohio only seeks to tax the appellant for the privilege of having done business locally and to use as the measure of this tax the total sales, wherever made, of goods sold directly from Ohio warehouses and factories. As stated by the Ohio Supreme Court, double taxation could not exist. If the same rule were to be applied by each state in which the appellant did business, exactly 100% of appellant's total sales—no more and no less—would be used in computing business done in the several states. Each sale would have to be filled from some warehouse or factory and the state in which such warehouse or factory would be located would be the only state to use such sale as an element in its assessment. Appellant urges that **International Harvester Company v. Department of Treasury**, 322 U. S., 340, is authority to the contrary. But, as we have stated in our previous discussion of due process, the International Harvester Company case was concerned with a gross receipts tax. A gross receipts tax is available only to tax receipts that arise from local business. Ohio could not levy a sales or gross receipts tax on appellant's sales in other states for it furnishes no

protection to such sales. But it may properly tax appellant's right to do local business and measure such tax, in part at least, by interstate sales.

Appellant states that **American Manufacturing Company v. St. Louis**, 250 U. S., 459, is not authority for the support of the Ohio tax because the St. Louis tax was levied for the privilege of manufacturing (appellant's brief, p. 29) "whether done by a person, partnership, association or corporation," while "The Ohio tax is laid only on corporations and solely because they are corporations." Since the only errors assigned by the appellant involve the due process and commerce clauses of the Constitution, it seems out of place herein to debate classification of taxpayers. This leaves only the question of whether there is a legal distinction between a tax based upon the privilege of conducting a manufacturing business and one on the permitting of the conduct of any corporate business. The latter, which is the Ohio tax, includes the former and is governed by the same legal principles. It is suggested that only the city of St. Louis could impose the manufacturing tax. By the same token, only Ohio could impose a franchise tax on appellant for the privilege of doing business in Ohio measured by sales of goods from Ohio warehouses and factories. Second, it is said that every state in which appellant does business could impose a tax, similar to the Ohio tax, on the appellant. That is a correct statement. But appellant would not be harmed, for it would find no single transaction would be included in the computation of the assessment in more than one state, to wit, the state from which the goods were shipped to fill the order.

We think the Supreme Court of Ohio correctly followed **American Manufacturing Company v. St. Louis**, 250 U. S., 459. The operation and effect of the Ohio law is to use as the measure of the tax, so far as we are concerned in this appeal, the total value of such sales as were made by the appellant of goods having an Ohio situs, irrespective of whether they were sold within or without the state of Ohio or in intrastate or interstate commerce. Payment of the tax is not made a condition of selling goods in either kind of commerce, but only of continuing to hold a license to do business in the state of Ohio. Like the St. Louis tax, the Ohio franchise fee produces no direct burden on commerce, domestic or interstate. It has only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other contribution to the cost of government. Therefore, like the St. Louis tax, it does not amount to a burden or regulation of interstate commerce.

CONCLUSION.

From the foregoing and numerous other cases touching the question of due process under the Fourteenth Amendment and the commerce clause of Article I, Section 8, Clause 3, it appears that the Ohio franchise fee was correctly assessed against the appellant for the tax years 1937, 1938, 1939 and 1940 by the tax commissioner of Ohio as modified by the Board of Tax Appeals of Ohio and affirmed by the Supreme Court of Ohio. Appellant's complaint appears to have been inspired by a failure to distinguish between sales and gross receipts tax decisions and decisions on franchise taxes levied on corporations for the purpose of authorizing the doing of local business but measured by elements or transactions that could not themselves be taxed by the taxing state. We believe the Supreme Court of Ohio has correctly followed the distinctions carefully made by this court and its decisions should be affirmed.

Respectfully submitted,

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APPENDIX A.

Section 5495, General Code of Ohio.

The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

APPENDIX B.

Section 5498, General Code of Ohio.

After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding

shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other

part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of Section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation.

APPENDIX C.

Section 5499, General Code of Ohio.

On or before June 15 the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent upon such value so certified, and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars.

Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each corporation at its principal office in the state of Ohio, or to such person in the state of Ohio as the corporation may designate in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as is provided in Section 5491 of the General Code. But no penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state.

APPENDIX D.

Rule No. 275, Adopted October 13, 1939, By the Tax Commissioner of the State of Ohio.

Rule No. 275. Business done in and out of Ohio.—Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.

All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.

In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

The denominator of such business fraction shall in all cases be the total sales wherever made.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S PETITION FOR REHEARING.

EDWARD R. LEWIS,
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JOSEPH L. DANIELS,
PAUL N. ROWE,
Attorneys for Appellant.

THE SUNNYCREST WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Appellee.

APPELLANT'S PETITION FOR REHEARING.

International Harvester Company, Appellant in the above appeal, respectfully petitions for a rehearing.

The Court states in the last paragraph of its opinion that:

> "there is nothing about application of the formula in this case that indicates a potentially unfair result under any circumstances. It is not even contended here that the amount of these taxes could be considered to bear an unjust or improper relation to the value of the privilege of doing business in Ohio if the legislature had imposed a flat franchise tax of the same amounts for the respective years which application of this formula has produced."

Apparently this observation was intended to apply both to the question under the due process clause and to the question under the commerce clause. We believe that this statement enunciates a doctrine which has never hereto-

fore been announced by the Court and one which, if followed to its natural conclusion, would lead to unforeseen and wholly improper results.

We submit that it is a dangerous test to adopt to say that because the legislature of Ohio could have enacted a statute on a proper allocation basis, which would have produced even more money than was produced by the Ohio franchise taxes involved in this appeal, such taxes are therefore unobjectionable. It is practically impossible for any two people to agree upon what constitutes an undue financial burden on a large taxpayer. During World War II, we have all seen income taxes mount to hitherto unknown levels. It is not the dollar burden of the tax that should be the test, and to make the dollar burden the test is to establish a dangerous standard. A tax of $100,000 per year, based on a fair allocation formula, would be constitutional, whereas a flat tax of $20,000 a year on an arbitrary basis, bearing no relation to the business done, or on an arbitrary or "loaded" formula would be unconstitutional. In short, the test is what the state has actually done, and not what the state might have done by a fairly apportioned tax. This, we understand, is exactly the test which this Court laid down in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, and in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

In *Alpha Portland Cement Co.* v. *Massachusetts*, the total tax amounted to only $800.45. The corporation's total net income per its federal return was $707,577.98, and its total tangible assets amounted to $16,992,355.22. Its total gross receipts were $10,717,546.43. It is obvious that a tax in Massachusetts of $800.45 would be neither confiscatory nor burdensome in a financial sense. But this Court said (page 218):

"It must now be regarded as settled that a State

may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, the State of Washington levied graduated filing fees upon the authorized capital stock of foreign corporations with a maximum limit of $3,000. The Court said that the $3,000 flat maximum did not save the tax. It noted the above quoted language in the *Alpha Portland Cement Co.* case, and held the enactment void both under the Commerce Clause and the Due Process Clause. The dollar burden is not the test.

In his dissenting opinion in the *Cudahy Packing Company* case, Mr. Justice Brandeis laid stress on the fact that the taxes were not measured by the amount of interstate commerce, that they "do not grow, or shrink, according to the volume of interstate commerce or of the capital used in it," and that the statute fixed a maximum limit of $3,000. (P. 467.)

But in the case of the Ohio franchise taxes here involved, there is no maximum limit, the taxes are largely measured by transactions in interstate commerce, and they grow directly with the volume of interstate commerce and shrink when such volume shrinks. We showed in Appellant's brief that the tax for 1939 would be almost doubled by including in the numerator of the business fraction, sales

by branches outside of Ohio of Springfield trucks shipped direct from the Springfield factory to dealers in other states.

The decision in the instant case cites *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, and *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, to the point that interstate sales may be included in the numerator of a franchise tax fraction. Both those cases, however, relied on the point that the increase in tax due to the inclusion of the interstate sales was negligible, that the property in Illinois might go down while the Illinois receipts went up, and vice versa, and that there was no necessary connection between the interstate receipts and the amount of the tax.

But in our case the inclusion of the interstate receipts practically doubles the tax, the increase is material, and moreover the property in Ohio could be reduced to nothing and the entire tax on the property fraction thereby wiped out, and still the total Ohio franchise tax for 1939, for example, would be increased from $15,655.00 to $21,132.00, or an increase of 35%.*

We fully appreciate, as the Court says, that no perfect apportionment of interstate business and property can be made by any formula, but nevertheless, where an apportionment results in practically doubling the tax by including business handled by out-of-state branches, it is evident that there is more involved than a mere failure to meet the test of perfect apportionment. We respectfully submit that the Ohio apportionment is so faulty that it inevitably results in taxing substantial property outside of Ohio and in placing a multiple and excessive burden on transactions in interstate commerce.

The above observations, as will be noted, apply both to

* Examples 1 and 2, Footnote, Appellant's Brief, p. 20. Property ratio 2.4654. (R. 62.)

the argument under the Due Process Clause and under the Commerce Clause. We now wish to treat very briefly the Due Process Clause and the Commerce Clause separately.

Due Process Clause.

We note that the Court said in footnote 3 on page 4 of the printed advance sheet that

> "The State contends here that it did not include in the 'business done' numerator an amount equal to the proceeds from sales by Ohio branches to Ohio customers of goods which were shipped to the Ohio customers from factories outside Ohio. Appellant insists that it did. We need not resolve this controversy, for we think the result is the same whichever view is taken."

We do not believe that this point should ever have been raised by the Appellee in his brief, nor in his oral argument before this Court, for the Stipulation of Facts signed by Thomas J. Herbert, Attorney General, and Perry L. Graham, Assistant Attorney General, agreed that there was no such controversy. Paragraph 14 of the Stipulation of Facts (R. 63) reads as follows:

> "14. In his computation, the tax commissioner has found the figure of business done in Ohio to be the amount of the sales proceeds of all goods manufactured by the company in Ohio, plus the amount of the sales proceeds received by Ohio branches from the sale of general line goods, that is, agricultural implements and machinery, tractors, stationary engines, and parts sold by the Ohio branches to Ohio dealers and users. These general line goods were all manufactured by the company outside Ohio."

We refer again to the testimony of Charles L. Johns (R. 20, lines 34-39); to R. 71, beginning in the fourth line from the bottom of the page with the words "the tax

commissioner" to the end of that sentence; also to R. 74, the last paragraph on the page; and also to R. 76, lines 3 to 7.

There is not a shred of evidence to support Appellee's contention. We have noted five references in the Record which definitely dispose of it, including the Stipulation of Facts signed by the Attorney General of Ohio.

This Court itself states on page 4 of its opinion:

> "Thus it measured the value of the Ohio sales agencies' business by the total amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio. Here again appellant's contention that this resulted in taxing out-of-state or interstate transactions or sales in violation of the Due Process clause is wholly without substance. The Ohio sales agencies' business and their sales to Ohio customers were intrastate activities. *International Harvester Co.* v. *Department of Treasury, et al.*, 322 U. S. 340."

The Court then goes on to approve the inclusion by the State of Ohio in the amount of the Ohio sales agencies' business, of the total "amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio." The very opinion of the Court, therefore, which states that it is not necessary to resolve the controversy, actually resolves it by approving the inclusion in Ohio business of the sales of goods manufactured outside of Ohio.

While in Appellee's brief and on the oral argument the attorney for Appellee agreed that the sales by Ohio branches to Ohio buyers of goods manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers should be eliminated, and even insisted that they had been eliminated, the fact remains that they have not been eliminated and that the decisions of the Ohio

Board of Tax Appeals, the Supreme Court of Ohio and of this Court have all approved their inclusion as Ohio business.

We respectfully point out that Appellant has never contended that the sales by the Ohio branches to Ohio customers were not intrastate activities. On Appellant's original Ohio franchise tax returns it included all sales by the Ohio branches to Ohio customers, whether the goods were manufactured in Ohio or outside Ohio, and whether they were shipped to the purchaser from an Ohio branch or direct from the factory outside Ohio to the buyer in Ohio. Appellant has never asked that the amount of sales by Ohio branches to Ohio customers of goods manufactured outside Ohio and shipped direct from the outside factories to the Ohio purchasers should be excluded.

But what Appellant did say, and now again submits, is that it is impossible to include as "Ohio business" both of the following classes of sales, without including in Ohio business one class of sales which is not Ohio business and has no situs in Ohio. These two classes of sales are the following:

(1) Sales made by Ohio branches of goods manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers.

(2) Sales by branches outside Ohio of Springfield trucks when the trucks were shipped direct from the Springfield factory to the buyers outside Ohio.

Surely, it is inconceivable that both these classes of sales could be Ohio business, when one of them is the exact opposite of the other.

Therefore, we cannot agree with the statement in the footnote on page 4 of the Court's opinion that "the result is the same whichever view is taken," namely, whether or not the sales by Ohio branches to Ohio buyers, of goods

manufactured outside Ohio and shipped direct from the outside factory to the Ohio buyers, are included in Ohio business. Financially, it certainly makes a difference because the amount of Ohio business is definitely increased by the amount of such inclusion. From the standpoint of due process, it clearly makes a difference, because we repeat that both these classes of sales cannot have a situs in Ohio.

Appellant has pressed this point throughout. It raised it in its Notice to the Board of Tax Appeals (R. 12); again in its Petition for Rehearing before that Board (R. 85); and again in its Amended Notice of Appeal to the Supreme Court of Ohio (R. 7) and before this Court.

A question was raised in Appellee's brief and in the argument before this Court as to the amount of these sales. The Record does not show the amount. The assessments involved in this appeal were first certified to the Attorney General on July 25, 1941, and certified by him to the Treasurer of the State of Ohio on July 29, 1941. From that time on, Appellant had only one course to take and that was to file an Application for Review within 30 days. This was done on August 25, 1941. (R. 8.)

It took the examination of 58,000 invoices for the year 1939 to ascertain the proportion of trucks shipped from the Springfield plant direct to buyers in other states. No one knows how many invoices appellant would have had to examine to ascertain the amount of goods shipped direct from numerous factories outside Ohio to Ohio buyers on sales by Ohio branches.

But as Appellant conceded that these sales were "Ohio business" under the decision in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, an ascertainment of the amount would only go to show the extent of the inconsistent inclusion in Ohio

business of sales by Ohio branches to Ohio buyers of goods of outside manufacture, shipped into Ohio direct to buyers, and at the same time the inclusion in Ohio business of sales of Springfield trucks shipped direct to buyers in other states on sales by branches in those states. The amount of the former sales has no effect on the question involved. But there is sufficient in the Record to show that the amount of such sales was considerable and not negligible.

The Board of Tax Appeals found that of the Springfield trucks shipped to United States destinations, 38% went direct to dealers and users in other states, and 62% went to Appellant's branches. It would seem to be a reasonable conclusion, if 38% of the Springfield trucks on sales by branches outside of Ohio to purchasers in their states were shipped direct from the Springfield factory to those purchasers, that a substantial proportion of the goods manufactured outside of Ohio, when sold by Ohio branches to Ohio buyers, were also shipped direct from the outside factories to the Ohio buyers.

Our point, which has not been covered by this Court in its decision, is that it is impossible to say that both these classes of sales are Ohio business.

The Court in its decision states that one branch of Appellant's business in Ohio is manufacturing, and that it "has long been established that a state can tax the business of manufacturing." We conceded both in Appellant's Brief and in Appellant's Reply Brief and on the oral argument that Ohio can tax the manufacturing activity. We said, however, that the Ohio tax is no more a tax on manufacturing than was the Indiana Gross Income Tax which this Court expressly held to be not a tax on manufacturing but a general tax on gross income. *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. The Ohio franchise tax is like-

wise not a tax on manufacturing, but a general tax on doing business, a tax which every state in which Appellant performs acts may impose. The 38% of sales of Springfield trucks shipped direct to buyers outside of Ohio, on sales by branches outside Ohio, are predominantly business in states other than Ohio, and the manufacturing activity in Ohio is only a partial and contributing factor in such business.

That manufacturing activity certainly does not escape under the Ohio franchise tax because under the property fraction tax imposed on one-half the franchise tax value, it is obvious that the manufacturing plant, machinery and equipment and inventories would weigh very heavily in the determination of the tax and fairly measure the manufacturing activity.

We respectfully submit that in its eagerness to reach the manufacturing activity, the state of Ohio has reached more than the manufacturing activity. It has reached the *selling* activity of Appellant in states other than Ohio. The sale of Springfield trucks here involved was wholly managed, operated and controlled by its branches outside Ohio. The branches outside Ohio in each case solicited the sale, accepted the order or contract of sale, directed the shipment of the truck, received the sales proceeds and collected the amounts when due. The entire difference between the manufacturing cost of a truck and the sale proceeds of that truck was due to the selling activities outside Ohio. The Springfield plant did nothing to create that value. Therefore, under the assessments as now approved, Ohio is not only reaching the manufacturing activity in Ohio, but it is reaching Appellant's selling activity outside Ohio. That selling activity, as measured by the gross proceeds of sales, is taxed in the states where the selling activity is carried on, is taxed also as business done for franchise tax

purposes, and as income earned under both net income and gross income taxes.

We have pointed out that the Ohio legislature had ample means, in addition to the property fraction, of reaching the manufacturing activity without resort to such a distorted franchise tax formula as is here involved. It could have imposed a manufacturer's excise tax. It could have made one element in the franchise tax formula the ratio of manufacturing cost in Ohio to total manufacturing cost. It could have made one element in the franchise tax formula the ratio of wages and salaries in Ohio to total wages and salaries.

But Ohio in these assessments has included in the numerator of the "business done" fraction the amount of Ohio sales plus 38% of the goods manufactured in Ohio and sold outside Ohio, whereas the denominator consists solely of total sales and nothing more.

For all these reasons, the resulting Ohio franchise tax formula as applied in this case is a distorted formula which inevitably allocates to Ohio a franchise tax value which arises and is located outside Ohio.

Commerce Clause.

Finally, we base our Petition for Rehearing on the ground that Appellant presented in this case an actual imposition of multiple taxation of the same gross receipts in interstate commerce transactions. This Court said in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340, that it would cross the bridge of double taxation when it came to it. This was a recession from the Court's position in *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, and in *Gwin, White and Prince, Inc.* v. *Henneford*, 305 U. S. 434, in which the Court said that if the tax

was of such a nature that it could be imposed in more than one state, the Court would not allow the first state to impose it. In short, in *J. D. Adams Mfg. Co.* this Court said that the very fact that the taxpayer was laid open to the possibility of multiple taxation was sufficient to cause the tax to be held invalid. In *International Harvester Company* v. *Department of Treasury, supra,* the Court said it would cross the bridge of double taxation when it came to it. We submitted in our briefs that we had come to that bridge, and yet in the decision in this case the Court says:

> "Since it has not been demonstrated that the apportionment here achieves an unfair result, *cf. Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123, 134, 135, and since it is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states."

We respectfully submit that this is an entirely new requirement, never yet laid down on the question of multiple taxation. If the tax is a multiple tax, there should be no necessity of showing that each tax in itself is unfair.

We have shown above that Appellant's Ohio franchise taxes as approved in this case include in the amount of Ohio "business done" the value created not merely by the manufacturing operations in Ohio, but also by the selling activities outside Ohio. We have also shown that the assessments herein involved include gross receipts from sales of Springfield trucks made by branches outside Ohio to buyers outside Ohio, where the trucks were shipped direct to the buyers outside Ohio, and that such inclusion results in almost doubling the tax.

We have also shown that 31 states include as business of their states in their income taxes, sales of Springfield trucks when Springfield trucks are sold by branches in those states to buyers in those states. We have shown that

10 states in the computation of their franchise taxes include sales of Springfield trucks when made by branches in those states to buyers in those states.

We have further shown that in Indiana a sale of a Springfield truck by an Indiana branch to an Indiana buyer is subject to the Indiana gross income tax, and that in any other state where a gross income tax or gross receipts tax is imposed, the sale of a Springfield truck by a branch in that state to a buyer in that state would be subject to that tax. And yet the same sale of a Springfield truck is included in the measure of the Ohio franchise taxes here involved.

This clearly is the use of the same gross receipts to determine; as the case may be, an Ohio franchise tax and another state's gross income tax, or the Ohio franchise tax and another state's net income tax, or the Ohio franchise tax and another state's franchise tax. We believe that it is important that the Court pass on this question of multiple taxation.

Appellant earnestly urges that a rehearing should be granted if for no other reason than to clear up some of the doubts raised by the Court's decision in this case which, unless clarified, we believe will cause widespread misunderstanding and difficulties in the determination of franchise tax liabilities of innumerable corporate taxpayers in the many franchise tax states.

To summarize, these doubts are:

1. The doubt raised by the apparent adoption by the Court of the test of whether, under all the circumstances, the tax in question constitutes a "potentially unfair result," thus apparently applying the test of the amount in dollars, instead of the test, which we submit this Court laid down in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, of the soundness of the formula.

2. The doubt raised by the Court's apparent adoption

of the rule that the objection of multiple taxation does not apply if the tax in question itself does not achieve an "unfair result." We submit that each one of the multiple taxes might be a fair tax in itself, and yet the multiple burden would result in each tax being unconstitutional.

3. The doubt raised by the apparent approval of the proposition that Ohio can reach after not only the manufacturing activity in Ohio, but also the selling activity in states other than Ohio which produced all the excess of the sales proceeds over and above the manufacturing cost in Ohio.

4. The doubt raised by the Court's approval of the action of Ohio in including in "Ohio business" sales of Springfield trucks sold by branches outside of Ohio to buyers outside of Ohio, where the trucks were shipped from the Springfield factory direct to the buyers outside of Ohio, and at the same time including as "Ohio business" sales by branches in Ohio to buyers in Ohio where the articles were manufactured outside of Ohio and shipped direct to the buyers in Ohio. This double inclusion necessarily results in the inclusion in "Ohio business" of business which does not have a situs in Ohio.

5. The doubt raised by the fact that the Court has not passed on the question of the multiple use of the same interstate sales receipts in arriving at the Ohio franchise taxes, and yet at the same time in arriving at another state's gross income tax, or net income tax in any one of 31 other states, or a state franchise tax in any one of 10 other states.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1946.

International Harvester Company, Appellant, v. William S. Evatt, Tax Commissioner of Ohio, Appellee.	On Appeal from the Supreme Court of the State of Ohio.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The Supreme Court of Ohio affirmed a decision of that State's Board of Tax Appeals fixing the amount owed by appellant for its State corporation franchise tax for the years 1935 to 1940, inclusive. 146 Ohio State 58. In affirming, the Ohio court rejected appellant's contention that the controlling tax act, §§ 5495–5499 Ohio Gen. Code, as applied to appellant, was in violation of the Due Process clause of the Fourteenth Amendment and the Commerce clause of the Federal Constitution. The case is here on appeal under 28 U. S. C. § 344. Appellant repeats its arguments as to invalidity of the tax, but only as to the years 1937 to 1940, inclusive.

Section 5495 of the Ohio Gen. Code provides that each foreign corporation authorized to do business in the State must pay a tax or fee for the "privilege of doing business" or "owning or using a part or all of its capital or property" or "holding a certificate . . . authorizing it to do business in the state". It is not denied that appellant owed a franchise tax under this section for it held a certificate to do business in Ohio during all the years in question. It also owned and operated two large factories at Springfield, Ohio, which produced millions of dollars worth of goods. And it operated four branch selling establishments associated with four warehouses, and fourteen retail stores, all located at various places in Ohio, which stored and sold goods produced at the Ohio factory.

But appellant also owns and operates sixteen factories, nearly a hundred selling agencies, and numerous retail stores in other states. Goods produced at its Ohio factories are not only sold in Ohio, but in addition, are shipped for storage to out-of-Ohio warehouses to be sold by out-of-Ohio selling agencies to out-of-Ohio customers. Some are shipped directly to out-of-Ohio customers on orders from out-of-Ohio selling agencies. Conversely, goods manufactured by appellant out-of-Ohio are shipped to its Ohio warehouses, and sold by its Ohio selling agencies to Ohio customers. Appellant's claim is that the amount of the tax assessed against it has been determined in such manner that a part of it is for sales made outside Ohio and another part for interstate sales. These consequences result, appellant argues, from the formula used by Ohio in determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales.

The tax is computed under the Ohio statute in the following manner: Section 5498 prescribes the formula used in determining what part of a taxpayer's total capital stock represents business and property conducted and located in Ohio.[1] To determine this, the total value of issued capital stock is divided in half. One half is then multiplied by a fraction, the numerator of which is the value of all the taxpayer's Ohio property, and the denominator of which is the total value of all its property wherever owned. The other half is multiplied by another fraction whose numerator is the total value of the "business done" in the State and whose denominator is country-wide business. Addition of these two products gives the tax base, which, when multiplied by the tax rate of 1·10 of 1%, produces the amount of the franchise tax.

[1] Section 5498 also sets out in some detail the factors to be considered, and those not to be considered, in calculating the total value of a taxpayer's issued and outstanding stock. These provisions are not here at issue.

In the "business done" numerator the State included as a part of Ohio business an amount equal to the sales proceeds of a large part of the goods manufactured at appellant's Ohio plants, no matter where the goods had been sold or delivered.[2] A part of the measure of the tax is consequently an amount equal to the sales price of Ohio-manufactured goods sold and delivered to customers in other states. Appellant contends that the State has thus taxed sales made outside of Ohio in violation of the Due Process clause. A complete answer to this due process contention is that Ohio did not tax these sales. Its statute imposed the franchise tax for the privilege of doing business in Ohio for profit. The State supreme court construed the statute as imposing the tax on corporations for engaging in business such as that in which taxpayer engaged. One branch of that business was manufacturing. It has long been established that a state can tax the business of manufacturing. The fact that it chose to measure the amount of such a tax by the value of the goods the factory has produced, whether of the current or a past year, does not transform the tax on manufacturers to something else. *American Mfg. Co. v. St. Louis*, 250 U. S. 459; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 288–289; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 189–190; *Wallace* v. *Hines*, 253 U. S. 66, 69. *Freeman* v. *Hewitt*, slip opinion No. 3, October Term, 1946, p. 6. See also *Adams* v. *Storen*, 304 U. S. 307, 313–314, and cases cited in notes 14 and 15.

In the Ohio "business done" numerator, we assume the State also included sales made by Ohio branches to Ohio customers of goods manufactured and delivered to these

[2] Rule 275, Tax Commissioner of Ohio, Oct. 13, 1939, exempted from the computation all goods manufactured by appellant in Ohio, but shipped to appellant's out-of-Ohio warehouses before sale.

Ohio customers from out-of-Ohio factories.[2] Appellant's business practice was to conduct and account for its sales agencies' activities separately and distinctly from its factory operations. The State followed this distinction. It treated the sales agencies as conducting one type of business and the factories another. Thus it measured the value of the Ohio sales agencies' business by the total amount of the preceding year's Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio. Here again, appellant's contention that this resulted in taxing out-of-state or interstate transactions or sales in violation of the Due Process clause is wholly without substance. The Ohio sales agencies' business and their sales to Ohio customers were intrastate activities. *International Harvester Co.* v. *Department of Treasury et al.*, 322 U. S. 340. What effect inclusion of this element in the "business done" numerator would have were these transactions not intrastate is a question we need not now decide.

What we have said disposes of the only grounds urged to support the due process contention. It also answers most of the argument made against the Ohio statute on the ground that its application to appellant unduly burdens interstate commerce and therefore violates the Commerce clause. Of course, the commerce clause does not bar a state from imposing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 336. Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportion-

[2] The State contends here that it did not include in the "business-done" numerator an amount equal to the proceeds from sales by Ohio branches to Ohio customers of goods which were shipped to the Ohio customers from factories outside Ohio. Appellant insists that it did. We need not resolve this controversy, for we think the result is the same whichever view is taken.

ment. See *e. g., Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *American Mfg. Co.* v. *St. Louis, supra*; *International Shoe Co.* v. *Shartel*, 279 U. S. 429, 433; *Western Cartridge Co.* v. *Emmerson* 281 U. S. 511. And here, it clearly appears from the background of Ohio's tax legislation that the whole purpose of the State formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted. In October, 1924, this Court struck down Ohio's then corporation franchise tax on the ground that it did not make an opportionment between local and interstate business so as to confine its tax to local business only. The tax was also held to be in violation of the Equal Protection clause. *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71. In April 1925, the legislature of Ohio passed a new act expressly to cure the defects this Court had found in the old law.[4] 111 Ohio Laws 471. That 1925 Act, as slightly amended,[5] is the law under which the present apportionment was made.

Plainly Ohio sought to tax only what she was entitled to tax, and there is nothing about application of the formula in this case that indicates a potentially unfair result under any circumstances. It is not even contended here that the amount of these taxes could be considered to bear an unjust or improper relation to the value of the privilege of doing business in Ohio if the legislature had imposed a flat fran-

[4] In vetoing the bill which became the law, on grounds not here relevant, the Governor of Ohio said: "The Supreme Court decision, of course made it necessary for you to devise a basis for the levy of the tax other than on the authorized capital stock. You have seen fit to embody in the pending measure an asset value or total net worth basis for the assessment of the tax on domestic corporations as well." Ohio House Journal 1925, Vol. III, 874. The bill was passed over his veto.

[5] 112 Ohio Laws 410 (1929); 113 Ohio Laws 637 (1929); 114 Ohio Laws 714 (1931); 115 Ohio Laws 589 (1933)

chise tax of the same amounts for the respective years which application of this formula has produced. See *Hump Hairpin Co.* v. *Emmerson*, *supra* at 296. Furthermore, this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that "rough approximation rather than precision" is sufficient. *Illinois Central Ry.* v. *Minnesota*, 309 U. S. 157, 161. Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. See cases collected in opinion of Mr. Chief Justice Stone, dissenting, *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 325. A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the intrastate privilege. Since it has not been demonstrated that the apportionment here achieves an unfair result, *cf. Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, 134, 135, and since it is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication of this tax by reason of its imposition by other states. None of them can tax the privilege of operating factories and sales agencies in Ohio.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 75.—October Term, 1946.

International Harvester Company, Appellant, v. William S. Evatt, Tax Commissioner of Ohio.	Appeal from the Supreme Court of the State of Ohio.

[January 6, 1947.]

Mr. Justice Rutledge, concurring.

I concur in the opinion and judgment of the Court. But I desire to add that, in the due process phase of the case, I find no basis for conclusion that any of the transactions included in the measure of the tax was so lacking in substantial fact connections with Ohio as to preclude the state's use of them, cf. *McLeod* v. *Dilworth Co.*, 322 U. S. 327, dissenting opinion at 352-357, if indeed a limitation of this sort were material to an apportionment found on the whole to be fairly made. For the rest, as the Court holds, the apportionment clearly is valid.